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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 91

UNITED STATES, APPELLANT,

vs.

ROY FRUEHAUF, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 16, 1960

PROBABLE JURISDICTION NOTED OCTOBER 10, 1960

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Criminal Docket

UNITED STATES DISTRICT COURT

Cr. 159-138

THE UNITED STATES

vs.

ROY FRUEHAUF (Ct. 1), FRUEHAUF TRAILER CO. (Ct. 1), BURGE SEYMOUR (Ct. 1), ASSOCIATED TRANSPORT, INC. (Ct. 1), BROWN EQUIPMENT AND MANUFACTURING CO. (Ct. 1), DAVE BECK (Ct. 2)

T. 29, Sec. 186(a)(d) & T. 18, Sec. 2, U.S.C.

Employers of employees engaged in an industry affecting commerce, unlawfully paying money to the President of the Union representing said employees (Count 1)

T. 29, Sec. 186(b)(d) U.S.C.—President, Int'l Bro. of Teamsters, etc., unlawfully receiving and accepting money from employers of employees engaged in an industry affecting commerce (Count 2).

(Total—Two Counts).

Statistical Record.
Costs.
Clerk.
Marshal.
Docket fee.

J.S. 2 mailed
J.S. 3 mailed—All.
Violation ——.

Docket Entries

Date	Proceedings

6-17-59. Filed Indictment.

7-1-59. Warrant of arrest ordered for Dave Beck. Noonan, J.

7-1-59. Filed notice of appearance by Mortimer Allen Sullivan, Esq. Wallridge Building, Buffalo, New York, as to deft Associated Transport, Inc.

7-1-59. Filed notice of appearance by Robert C. McCreedy, Esq., 233 Bway, N.Y. as to deft Brown Equipment & Manufacturing Co.

7-1-59. Filed notice of appearance by Simpson, Thacher & Bartlett, Esqs. 120 Bway, N.Y. as to deft Burge Seymour.

7-2-59. Roy Fruehauf—Pleads Not Guilty—Bail fixed at $2,500. Paroled until 4 P.M. to give bail.

7-2-59. Fruehauf Trailer Co.—Pleads Not Guilty by Roy Fruehauf, President.

7-2-59. Burge Seymour—Pleads Not Guilty—Released on own recognizance.

7-2-59. Associated Transport, Inc.—Pleads Not Guilty by David Scheckter, Vice-President.

7-2-59. Brown Equipment & Mfg. Co.—Pleads Not Guilty by C. W. Vale, Treasurer.

[fol. 2] 7-2-59. Dave Beck appears in court with counsel and warrant of arrest is vacated. Defendant Pleads Not Guilty—Bail fixed at $2,500:—Paroled until 4 P.M. to give bail.

Charles Burdell, Esq., of Seattle, Washington allowed to appear for Defendant Beck in this case.

Individual defendants ordered fingerprinted. Motions to be made returnable by 8-12-59. Noonan, J.

7-2-59. Filed notice of appearance by Charles Seligson, Esq. 350 Fifth Ave. NYC as to deft Fruehauf Trailer Co.

7-2-59. Filed notice of appearance by Phillips, Nizer, Benjamin, Krim & Ballon Esqs., by Louis Nizer for Defendant Roy Fruehauf. (1501 Broadway, NYC.)

7-2-59. Filed notice of appearance by James D. Walsh, Esq., 347 Madison Ave., N.Y. 17, N.Y., by Charles Burdell, Esq., for Defendant Dave Beck.

7-2-59. Dave Beck—Filed Consents & Order extending the bail limits of the defendant to include the State of Washington. Noonan, J.

DOCKET ENTRIES

Date	Proceedings

7-2-59. Roy Fruehauf—Filed Consents & Order extending the bail limits of the defendant to include the states of Michigan, Indiana, Illinois and Ohio. Noonan, J.

8-12-59. Roy Fruehauf—Filed order enlarging the bail limits in the prior order of this court per Judge Noonan, dated July 2, 1959 hereby are extended to include the State of California. Herlands, J.

8-12-59. Filed original notice of appearance on 7-1-59. All notices, papers etc. to be mailed to my N.Y. Office in % Associated Transport, Inc. 380 Madison Ave. N.Y.

Sep. 1, 1959. Filed Transcript of record of proceedings, dated 7/2/59.

Sep. 3, 1959. Filed Transcript of record of proceedings, dated 8-12-59.

10-9-59. Roy Fruehauf—Filed affidavit and notice of application for enlargement of bail limits.

10-9-59. Roy Fruehauf—Filed order & the consent by Nat'l Surety Corp. that the bail limits of the def't are extended to include Killarney, Ontario the two-day period of Oct. 10 & 11 of 1959. Edelstein, J.

1-11-60. Roy Fruehauf—Filed Notice of application to assign case for trial.

1-29-60. Filed Memo Endorsed on Motion Papers filed 1-11-60—"Motion granted to the extent of fixing Feb. 23, 1960 as a trial date and referring trial to Judge A. J. Connor." Weinfeld, J.

Notices Mailed.

Feb. 4, 1960. Filed Transcript of record of proceedings, dated 1-25-60.

Feb. 8, 1960. Filed Transcript of record of proceedings, dated 10-21-59.

[fol. 3] 2-9-60. Docketed Order to Show Cause and Affidavits, filed 2-5-60, why the trial, now set for 2-23-60, before Aloysius J. Connor, U.S.D.J., should not be deferred, etc.—Memorandum endorsed: Motion Granted to the extent of setting the case down for trial before Judge Sugarman on 2-18-60, at 10:30 A.M. Weinfeld, J.

2-10-60. Filed Transcript of record of proceedings, dated 1-29-60.

DOCKET ENTRIES

Date	Proceedings
	2-18-60. Hearing begun before Sugarman, J.
	Deft. Roy Fruehauf—motion to dismiss granted.
	Deft. Fruehauf Trailer Co.—motion to dismiss granted.
	Deft. Burge Seymour—motion to dismiss granted.
	Deft. Associated Transport, Inc.—motion to dismiss granted.
	Deft. Brown Equipment & Manufacturing Co.—motion to dismiss granted.
	Deft. Dave Beck's motion to dismiss granted.
	Bail cont'd as to Deft. Roy Fruehauf & Deft. Dave Beck, Sugarman, J.
	3-7-60. Dave Beck—Filed recognizance after indictment (Cash Bail), dated 7-2-59—$2,500.—Dave Beck, Principal & Surety.
	3-7-60. Roy Fruehauf—Filed recognizance after indictment, dated 7-2-59—$2,500. National Surety Corp.
	3-10-60. Filed Transcript of record of proceedings, dated 2-18-60.
	3-18-60. Filed Notice of Appeal to the Supreme Court of the United States, of the U.S.A., from the order entered 2-18-60, dismissing the indictment. (Appeal taken pursuant to 18 U.S.C. 3731) & request to Clerk to prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the U.S.
	3-23-60. Roy Fruehauf—Filed Affidavit and Notice of Motion to release def't on his own recognizance, permitting him free movement without restriction and discharging the National Surety Corp. from its liability in connection with the bail bond.
	3-25-60. Dave Beck—Filed Affidavit & Notice of Motion-releasing the deft on his own recognizance permitting the free movement of the deft. without restriction; and directing the Clerk of the Court to pay out of the Registry of the Court, to Dave Beck, the person who deposited it, the sum of $2,500. less the Clerk's fees, if any.
	3-28-60. Roy Fruehauf—Filed Memo Endorsed on Motion Papers filed 3-25-60—"Application Granted. The Gov't consents to the deft's release on his own recognizance. Submit Order. Notice Mailed. Cashin, J.

DOCKET ENTRIES

Date Proceedings

4-1-60. Roy Fruehauf—Filed Order releasing def't on his own recognizance, permitting him free movement without restriction and discharging the National Surety Corp. from its liability as surety in connection with the bail bond posted by it in behalf of deft't. Cashin, J.

[fol. 4] 4-11-60. Dave Beck—Filed Order releasing def't on his own recognizance, permitting him free movement without restriction and that the Clerk of the Court pay out of the Registry to Dave Beck, the sum of $2,500, less the Clerk's fees, if any. Cashin, J.

4-15-60—Filed Affidavit & Order directing the Clerk to transmit to the Clerk of the Supreme Court of the United States all original papers specified in the notice of appeal of the U.S.A. & that they be returned to this Court upon the conclusion of this appeal. Metzner, J.

[fol. 5] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INDICTMENT AND ENDORSEMENTS

The Grand Jury charges:

On or about the 21st day of June, 1954, in the Southern District of New York, Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc. and Brown Equipment and Manufacturing Co., defendants, employers of employees who were engaged in an industry affecting commerce, did lawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to Dave Beck, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000.

[Title 29, United States Code, Section 186(a)(d) and Title 18, United States Code, Section 2.]

Count Two

The Grand Jury further charges:

On or about the 21st day of June, 1954, in the Southern District of New York, Dave Beck, defendant, a representative of employees who were engaged in an industry affecting commerce, to wit, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associ-
[fol. 6] ated Transport, Inc. and Brown Equipment and Manufacturing Co., employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000.

[Title 29, United States Code, Section 186(b)(d)]

Harry J. Cobb, Jr., Foreman.

/s/ S. Hazard Gillespie, Jr., United States Attorney.

[fol. 7] [Endorsed:] Cr 159-138 U. S. District Court. The United States of America vs. Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., Brown Equipment and Manufacturing Co. and Dave Beck, Defendants. Indictment. Violations: Title 29, U.S.C., § 186(b)(d) and Title 18, U.S.C., § 2. S. Hazard Gillespie, Jr., United States Attorney. A true bill. Harry J. Cobb, Jr., Foreman. Filed U. S. District Court S. D. of N. Y. June 17, 1959.

July 1—1959.

Warrant of arrest ordered for Dave Beck, Noonan J.

July 2—1959.

Roy Fruehauf Pleads not guilty—Bail fixed at $2500. Paroled until 4 p.m. to give bail.

Fruehauf Trailer Co. Pleads not guilty—by Roy Fruehauf—President.

Burge Seymour Pleads not guilty—Released on own recognizance.

Associated Transport, Inc. Pleads not guilty—by David Schecktér, V.P.

Brown Equipment & Mfg. Co. Pleads not guilty—by C. W. Vale, Treasurer.

Dave Beck appears in Court with Counsel and warrant of arrest is vacated. Deft. Pleads not guilty—Bail fixed $2500.

Charles Burdell, Esq of Seattle, Wash. allowed to appear for deft. Beck in this case—Deft. Paroled until 4 p.m. to give bail.

Individual defendants ordered fingerprinted.

Motions to be made returnable by 8/12/59; Noonan J.

[fol. 7a] February 18, 1960.

Case called before Sugarman J. Hearing begun.

Deft. Fruehauf motions to dismiss—Granted.

Deft. Fruehauf Trailer Co. motions to dismiss—Granted.

Deft. Burge Seymour motions to dismiss—Granted.

Deft. Associated Transport Inc. motions to dismiss—Granted.

Deft. Brown Equipment & Mfg. Co. motions to dismiss—Granted.

Deft. Beck's motions to dismiss—Granted.

Bail cont'd as to Both Defendants, Sugarman J.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Cr. 159-138

UNITED STATES OF AMERICA,

vs.

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO. AND DAVE BECK, Defendants.

Stenographer's Minutes of February 18, 1960

Before: Hon. Sidney Sugerman, District Judge

New York, 10:30 o'clock a.m.

APPEARANCES:

S. Hazard Gillespie, Jr., Esq., United States Attorney, for the Government; By John A. Guzzetta, Esq., and Edward Brodsky, Esq., Assistant United States Attorneys.

Phillips, Nizer, Benjamin, Krim & Ballon, Esqs., Attorneys for Defendant Roy Fruehauf; Louis Nizer, Esq., of [fol. 9] Counsel. Charles Seligson, Esqs., and Albert I. Schmaulholz, Esq., Attorneys for Defendant Fruehauf Trailer Co.

Simpson, Thacher & Barlett, Esqs., Attorneys for Defendant Burge Seymour; Cyrus R. Vance, Esq., and Edward Weisl, Jr., Esq., of Counsel.

Mortimer Allan Sullivan, Esq., Attorney for Defendant Associated Transport, Inc.

Robert C. McCreedy, Esq., Attorney for Defendant Brown Equipment and Manufacturing Co.

James D. Walsh, Esq., Attorney for Defendant Dave Beck; Charles Burdell, Esq., of Counsel.

[fol. 10] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: There are some preliminary matters I wish to conclude which were not resolved at our pretrial conference before we actually get into the work of the case.

I want to be perfectly sure that there is actual representation on behalf of each defendant.

Mr. Louis Nizer represents Roy Fruehauf?

Mr. Nizer: Yes, your Honor.

The Court: Charles Seligson represents the Fruehauf Trailer Company.

Mr. Seligson: Yes, your Honor.

The Court: Who is of counsel to Simpson, Thacher & Bartlett in representing the defentant Seymour?

Mr. Vance: I am, your Honor.

The Court: Now who appears for Associated Transport?

Mr. Sullivan: I do, your Honor, Mortimer Sullivan.

The Court: Mr. McCreedy represents Brown Equipment?

Mr. Sullivan: He has been delayed and I will speak for him until he gets here.

The Court: Who represents the defendant Beck?

Mr. Burdell: I do, your Honor. I am Charles Burdell. [fol. 11] I was admitted specially in this Court at the time of the arraignment. I am not sure that it was for the entire purpose of the case——

The Court: Well, is there any objection by the government?

Mr. Guzzetta: Absolutely none, your Honor.

The Court: Now, I have received trial memoranda from the government, an original and supplemental memorandum from the defendant Roy Fruehauf, a memorandum from Fruehauf Trailer, a memorandum on behalf of—is that pronounced Burge Seymour?

Mr. Vance: Yes, your Honor.

The Court: On behalf of Burge Seymour.

Now, does any other defendant wish to submit a trial memorandum?

Mr. Burdell: I have a trial memorandum prepared, your Honor, which I can provide to you this morning, except that there are two pages which need to be stapled to the end of it, and I thought that during the recess——

The Court: We will take care of that. May I have it, please?

Mr. Burdell: Yes (handing to Court).

[fol. 12] The Court: I should like to inquire if the defendants are present, all the individual defendants. Is Roy Fruehauf present?

Mr. Nizer: Yes, sir.

The Court: Is Burge Seymour present?

The Defendant Seymour: Yes, sir.

The Court: Is Dave Beck present?

The Defendant Beck: Yes, sir.

The Court: Now, from a reading of the trial memoranda which were available I got the notion that at least some of the defendants intend to move to dismiss the indictment. As I understand the rules, the Federal Rules of Criminal Procedure, Rule 12, that motion should be made now.

Does any defendant wish to be heard on a motion to dismiss the indictment?

Mr. Nizer: Well, your Honor, I thought we would be in a better position to address ourselves to the grounds for a dismissal after the government had made an opening here, but if on inquiry in this pretrial, preliminary conference, the government conceded certain positions that it has conceded at arraignment and other places in the minutes—to make it without some background which is the basis for some of the motions might leave the situa-[fol. 13] tion in a position where your Honor would have a series of arguments without foundation. For example, the loan: I have here the minutes of the arraignment, the comments made by Mr. Hazard Gillespie in which he was speaking for the government——

The Court: Well, Mr. Nizer, of course, you don't have the advantage of the government's trial memorandum because I think it was the choice of the defendant—I don't know whether the government joined in that—not to exchange trial memoranda.

Mr. Guzzetta: I acceded to that, your Honor; I didn't join.

Reading of Excerpts from Government's Trial Memorandum

The Court: Well, to the extent that you don't know the government's position, at least on the matter of the loan, I will read now into the record what I consider to be a judicial admission by the government from its brief.

> "This memorandum is submitted for the purpose of supplying the Court with a general outline and

analysis of the facts the government intends to prove together with an exposition of the statutory and decisional law regarding the crime charged in the instant case."

I then omit the first paragraph of the portion of the brief headed "Background And Statement of Facts In- [fol. 14] tended to be Proved," which deals with the indictment, and proceed with the following, which begins a quote:

"The facts which support the charge and which the government intends to prove are as follows:

"In about the middle of 1954 Dave Beck, at that time president of the International Brotherhood of Teamsters, asked Roy Fruehauf to lend him $200,000. Subsequently, the loan was discussed at a meeting held in Fruehauf's Detroit office attended by Fruehauf, Alfons B. Landa, an attorney for the Fruehauf Trailer Co. and one of its directors, and Simon Wampold, attorney for Dave Beck. Landa thereafter contacted the officers of various banks in an unsuccessful attempt to place the loan. Finally, Fruehauf and Burge Seymour found it necessary to arrange the loan without the aid of financial institutions and, instead, processed it through the Fruehauf Trailer Co. (Roy Fruehauf, president), Associated Transport Co. (Burge Seymour, president), and the latter's wholly owned subsidiary Brown Equipment and Manufacturing Co. At the time Fruehauf Trailer Co., Associated, and Fruehauf and Seymour knew that Beck [fol. 15] was a representative of teamsters; indeed, by his own admission, Fruehauf considered Beck and the teamsters to be as one."

Mr. Guzzetta: Excuse me, your Honor. I think you left out a phrase inadvertently. At the time Fruehauf Trailer Company, Associated and Brown all employed"——

The Court: Oh, yes, I beg your pardon. "Brown all employed members of the Teamsters Union, and Fruehauf and Seymour knew that Beck was a representative of teamsters; indeed, by his own admission,

Fruehauf considered Beck and the teamsters to be as one.

"The method by which this otherwise simple transfer of $200,000.00 from Fruehauf to Beck was effected is a fairly complex one, apparently caused by difficulties encountered by the defendant employers in effectuating what they have called a 'loan' but without officers of their corporations learning of the transaction.

"The proof will demonstrate the details of this circuitous financing operations as follows.

"First, Roy Fruehauf contacted Burge Seymour and informed him of Beck's request for $200,000.00. [fol. 16] Neither Fruehalf nor Seymour wished to effect the loan by use of personal funds. To complicate matters further neither Fruehauf nor Seymour felt that their respective corporations could overtly finance the transfer of funds in such an amount without embarrassing themselves. It was determined therefore that Brown Equipment and Manufacturing Co., Associated's wholly-owned subsidiary, would actually make the transfer to Beck. The process involved in order to effectuate this transfer is perhaps best understood by a step-by-step delineation:

"1. By check dated June 21, 1954, $175,000.00 was transferred from the Fruehauf Trailer Co. to Brown. In return Fruehauf Trailer Co. received a $175,000.00 promissory note from Brown payable December 30, 1954, and purporting to bear interest in the amount of 5% per annum. (By defendants Fruehauf's and Seymour's admissions, no interest was ever paid to, or even anticipated by, Fruehauf or his corporation.)

"2. Brown, by four checks for $50,000.00 each, dated June 21, 1954, transferred $200,000.00 to Beck. In return it received Beck's promissory note dated June 18, [fol. 17] 1954, for $200,000.00 at 4% per annum, payable December 30, 1954. A Brown check requisition form states that the $200,000.00 is a temporary advance to the A.C.T. Committee (Independent Advisory Committee to the Trucking Industry). The reason given by defendant Seymour for listing the money to A.C.T.

is that by this means the people in Associated would not know that Beck was borrowing Associated funds.

"3. On June 21, 1954, Associated transferred $200,000.00 to Brown. One week later, on June 28, 1954, Brown returned to Associated $175,000.00 having then been lent that amount by Fruehauf Trailer Co. Later, on December 30, 1954, after Seymour had renegotiated the loan with Manufacturers Trust Co., Brown returned the remaining $25,000.00 to Associated. (It should be noted that Beck was supposed to, but did not, repay the 'loan' to Brown by December 30, 1954.)

"4. On December 27, 1954, Seymour borrowed $200,000.00 at 4% per annum for ninety days from the Manufacturers Trust Co. collateralizing this loan as follows:

"(a) The aforementioned promissory note from [fol. 18] Beck to Brown for $200,000.00, payable December 30, 1954;

"(b) A promissory note endorsed by Landa and Fruehauf to Seymour for $175,000.00 due March 8, 1955; and

"(c) A 'repurchase letter' dated March 8, 1955, signed by Seymour and Leon Greenbaum, his personal friend.

"The $200,000.00 was transferred by Seymour to Brown which, by checks for $85,000.00 and $90,000.00, transferred $175,000,000.00 to the Fruehauf Trailer Co. on December 26, 1954.

"5. Seymour paid interest to the Manufacturers Trust Co. totaling $2,066.66 and, by check dated March 30, 1955, returned the $200,000.00 loan to the bank.

[fol. 19] "6. That Beck paid the $200,000 loan from Brown by remitting to Seymour $163,215. on or about April 11, 1955, and $36,785. on or about June 30, 1955, which Seymour endorsed to Brown.

"7. Only $4,000 interest, approximately half of the interest due, was actually paid and that was remitted in the form of a check dated May 3, 1955, from Landa to Seymour."

Now, in my view that statement by the government is a judicial admission that the transaction was a loan. As a

matter of fact, to verify that belief, the government later argues in its brief that the use of the money was a thing of value. So at least, so far as I am concerned, there can be no dispute that the government's position is that this was a loan, and we are now resolved to the question of whether a loan under these circumstances was illegal under the statute before the amendment of 1959.

Now, Mr. Nizer, on the basis of the disclosure by the Court of what the Court understands to be a judicial admission by the government, do you wish to be heard on the preliminary application for a dismissal of the complaint, or do you wish to go to trial?

Mr. Nizer: No, sir, I would like to be heard on the mo-[fol. 20] tion, your Honor.

The Court: Very well.

Mr. Guzzetta, I see that you have arisen. What is your thought on the matter?

Mr. Guzzetta: Simply to communicate one thought to the Court that may not have been communicated by my brief.

The Court: Yes.

STATEMENT ON BEHALF OF UNITED STATES

Mr. Guzzetta: Despite the fact that there is the repeated use of the word "loan" in the government's advance outline before the Court, caused by the fact that the government's case in large part is as asserted by these defendants as the trial will reflect as it proceeds, nevertheless the government's position on the loan, and I hope to make this clear as the trial progresses, is actually twofold.

A loan, if your Honor please, is something that relates to a state of mind between the person who is receiving the money and the person who is giving the money, and again the repayment which actually occurred in this case is only one aspect of whether or not the transfer of funds between one party or from one party to another is actually a loan.

Now, to be quite specific, I will simply say that the position that the government takes is that the government has [fol. 21] called this a loan, and in reiterating the facts as we know them from the defendants, the defendants having repeatedly used the word "loan," we say that this is not necessarily so, because in fact any loan when it is made,

to prove the fact that it was a loan, goes through certain stages, and is accompanied by certain attributes and here those items were not present in this case.

For example, there was no collateral given by the recipient of this loan for $200,000. An additional item in connection with the loan, which I related in the brief, was that the loan could not be processed through financial institutions. It had to be effectuated and implemented by the defendants Fruehauf and Seymour through the corporations which they controlled. They could not get it elsewhere.

The facts will show further that although interest purportedly was to be paid in the intercorporate transaction, no interest attached to the loan, and, in fact, no interest was paid between the corporations. That is the third aspect of it.

And fourthly, although there purported to be four per cent interest payable by the defendant Beck to complete the particular act of repaying the loan, the fact is that he did not pay the four per cent.

[fol. 22] That is our first position. And the second position is that even if this is a loan as a matter of law it is still encompassed within the statute.

I just wanted to make that position clear to your Honor.

The Court: Well, Mr. Guzzetta, I do not think that anything you said detracts from the argument that you made in your memorandum, that you are going to prove that this was a loan, and on that basis I intend to entertain an application with respect to the dismissal of the indictment.

Motion to Dismiss Indictment

Mr. Nizer: May it please your Honor, I do now move to dismiss the indictment on the ground that the transaction here complained of was not a violation of law, in accordance with the present statement of the government. The fact that Mr. Guzzetta points out as a distinction for diminishing or detracting from the fact that it was a loan—the fact that there was no security for the loan, even assuming that that was so—to me that is also a further admission that it was a loan, but unsecured as such, and that raises the same simple question as if it were a secured loan.

Now, I know of no rule of law that I can go to that holds that a loan is not a loan, or in order for it to be called a [fol. 23] loan it has to be collateralized, or that the debtor has to pay some interest, or that it has to be endorsed.

Furthermore, in order that we may come to grips here and get to the verities of this situation, and so that your Honor will have it in your mind before you, in previous proceedings had before this Court, at the time of arraignment and otherwise, the government at that time recognized the fact that it was a loan which was the real transaction —which they now suggest would not have been a violation of law—yet indicted these defendants in language as follows:

That on or about a certain date these defendants agreed to pay, knowingly and wilfully—knowingly agreed to pay and deliver to David Beck a thing of value, to wit: money in the amount of $200,000, your Honor, and I repeat that, "a thing of value, to wit, money in the amount of $200,000."

Now, I think that any fair reading of that indictment would mean that what was delivered was $200,000 in cash, as if it were a bribe. There is not the slightest intimation of a loan. Furthermore, your Honor, let me say this: When we were before the Court on the arraignment I challenged this indictment even then, although it was not the appropriate time for motions, but yet Mr. Gillespie, the United States Attorney, fairly stated the government's position, and I read from page 10 of the minutes taken on July 2, 1959, where he says:

> "Both the defendant Fruehauf and the defendant Seymour admitted under oath joining forces to provide the defendant Beck with a $200,000 loan."

Now, your Honor, he claims that they did not do anything else but that it was a loan right there, and then he goes on to say:

> "The scheme was for the defendant Brown Equipment and Manufacturing Company to forward the $200,000 to Beck, after previously receiving $175,000 from the defendant Fruehauf Trailer Company; and $25,000 was from the Associated Transport, Inc.

"While it is claimed by the defendants that this money was paid back a year later with four per cent interest, Beck did receive this payment at the time it [fol. 24] was made and had the use of the money for a substantial period."

Now, your Honor, he says there Beck "had the use of the money." That is a loan.

So as early as July 2, 1959, the government took the position that the use of the money in the form of a loan was what they were referring to.

Need I point out what a fatal, prejudicial variance that is from the allegation that what was delivered was a thing of value, to wit: money in the amount of $200,000, giving rise obviously to the impression which the newspapers did not hesitate to adopt, that they were indicted because $200,000 was passed under the table to somebody, whereas that was not the transaction at all.

It was at all times, and whenever any occasion presented itself, it was at all times brought into the open voluntarily, having been revealed in various conferences with the government, so that the government knew this as far back as 1956 and 1957. And so, your Honor, we are dealing with a loan, and while I do not adopt any of the other language with which the government characterizes this transaction, in what your Honor was kind enough to read into the record, I say that what is there, despite the fact that they have [fol. 25] not told the whole story, makes this indictment even more outrageous. What is there is sufficient to indicate that this is not only a fatal and substantial variance, on which ground alone the indictment should be dismissed, but clearly apart from that there are other grounds, and I will address myself to them. I do so with some reluctance with respect to the length of the argument, because I know that your Honor has pored over these briefs and has undoubtedly absorbed the many arguments time and time again, and my purpose is not simply to make an address for this record or to belabor the points because it is only logical for me to assume the fact that your Honor has read the authorities. That being the fact I need not quote from them at length, but I would like to make an outline and make a short argument rather than an extensive and detailed

statement with respect to Section 186, part of the National Labor-Management Act. That Act has a purpose, a very benign and proper purpose, which is to protect the unions from having their labor leaders traffic with their rights or sell away their rights, or diminish their rights, because they have at the same time to deal with employers whose employees are members of that union for which that [fol. 26] particular representative is negotiating.

Now, your Honor, that is a very salutary section and we have no quarrel with it at all.

In all of the cases that have dealt with its purpose, it is clear that wherever the situation arose between the alleged representative of the employees and the employer, it was indicated that there was an attempt to traffic with the representative, the labor representative. Where the fact was that there was a personal relationship by reason of the fact that these representatives are friends with people in the industry—that the labor leader may be friends with others in the industry (even though they fight like cats and dogs, there is still that relationship) so that they have a chance to talk with each other, and a chance to deal with each other, without labor trafficking then Congress has indicated that that is not violative of the statute.

Also, your Honor, while on this same subject, Judge Learned Hand in his dissenting opinion in the Ryan case, which was later upheld by the United States Supreme Court, specifically raised the question, though that was a [fol. 27] person who was involved in a terrible state of facts—the nefarious labor leader Ryan, who received cash under the table which was purported to be all kinds of gifts, given to him in the month of May but supposedly Christmas gifts. That was the theory of that case, and it was an evil case. And there was a labor leader who had negotiated the contract and signed it.

We have no contract with the International Teamsters, and we never negotiated with Mr. Beck, and the government does not claim that we had. Only 289 employees in the Local Teamsters Brotherhood Unions, out of 10,000 employees—that is what we have. But forgetting the distinction, in fact Judge Learned Hand in that case, at the end of his opinion, discourses of a gift—in the sense that it was used, as a gift and not a loan—and indicates that

if the gift was given to a labor leader who was also your friend and it was not given to influence labor representation but because he was your friend, he said that would be another matter which he would have to deal with in due course. That is in substance what Judge Hand said, so that even in the most flagrant case of sheer bribery, sheer [fol. 28] bribery, the Court held up a flag and said that you must determine whether the purposes and intentions of the statute are violated by such gifts. That has to do even with gifts.

Now, in this situation, the government, rushed in with an indictment on the last day, about five years after the event, and it has rushed in with this indictment with full knowledge of the testimony that has been developed by the FBI investigators, FBI investigations, to which we submitted ourselves voluntarily. As a matter of fact, one of these men here even was sworn in by an FBI man and gave testimony.

Now, your Honor, the defendants volunteered all this information, and the government as a result knew all the facts and the truth of this situation which was fully set forth for them.

Now, for the purposes of this motion, and having reference to these facts as admitted it is important, your Honor, we believe, to get a perspective of them.

There are three links to this chain. On the left is Mr. Beck; on the right is the Manufacturers Trust Company, which ultimately made the loan, not through Fruehauf [fol. 29] Trailer Company, not through Associated, not even through Brown, but the loan was made by the Manufacturers Trust.

The government admits that there was a subsequent loan, and, as your Honor read from their brief, it was "renegotiated" as they put it, and it was repaid. That is correct. It was nearly six months, or there was nearly a six-month interval, between this first link and the third link, and we have been indicted with the second link in the meantime. It was an interim stop-gap arrangement, and provided money until the Manufacturers Trust Company made the loan, which it did, and the description of which is before your Honor. This should be seen in the proper perspective, as bearing upon the middle link, which

at best, according to their theory, was breached. That is the period or the breach in the gap up until the time when the bank came through with the loan, during which they indicate that there was some violation of law.

Now, if we only had the first link and the third link—the Manufacturers Trust Company—I don't think under any theory the government would have elected to claim that there was any violation of law. But with all of this [fol. 30] present, they go upon the fact that in between those two transactions, there was an interim loan, and as result there was involved a violation of law.

[fol. 31] But I point out to you, your Honor, that it does not make a bit of difference in connection with this. There was nothing surreptitious about it nor was there any wrong purpose in the fact that, as an interim arrangement, the situation arose which your Honor read as described in the Government's brief.

It does not make a bit of difference how it was done. It seems to me in tracing all of these steps, there is raised an implication of deviousness, and that such deviousness should be applied in the action of the defendants.

Well, what did happen was that until the Manufacturers Trust Company did give this money, we in the meantime helped out Mr. Beck with the loan. That loan, I repeat, your Honor, was something which was openly done. They had included in it the four percent interest to be given to the Brown Equipment Company, which advanced the money until the Manufacturers Trust Company came through with the loan.

This is not a case, your Honor—as has often occurred, unfortunately—where someone had to transact business, a case where he says, "Well, I intended it to be a loan" five years after the fact. No, this is not such a case. This is something that the Government knew all about. Simul-[fol. 32] taneously the Government conceded it themselves when originally they were supplied with all this information. The FBI examined the files fully. They sent men to Washington to find out all about this and they were supplied with whatever information they asked for, supplied with all the documents at our command, and they were given all that in 1954, and in 1954, in July, they knew about the payment, they knew all about the money, and

they knew all about every aspect of this loan. Beck was loaned $200,000 by check, and we endorsed the notes to the bank, and this was repaid, your Honor, before a single inquiry was made. It was not repaid because of any action on their part. This transaction was made honestly and closed honestly, and it was made in good faith.

The McClelland Committee looked into the matter in 1957 when they were examining Mr. Beck about transactions and when this one came out, but at that time in 1957 this loan had been repaid for two years and repaid in good faith.

Now the question is as to the statute which deals with a misdemeanor, which is malum prohibitum, and not malum in se, in connection with such a transaction.

[fol. 33] I may say at this time, your Honor, that I am going into some of these things in the manner in which I am because there is no jury here, and we more or less have an understanding. I say the reason why Mr. Beck asked that the matter be handled in a particular way, was that here were Mr. Fruehauf and Mr. Seymour, having been grouped together on this committee called A.C.T., which was bought into being by the trucking companies, the large trucking firms, who were called upon when the Korean war was starting to keep the trucks moving, to see that the shipments of material were moving adequately back and forth, and they did all that they could to see that such things transpired.

Now I hope Mr. Beck takes no offense at my saying this, but I don't think there can be any dispute about the facts as they existed, because in 1954, he was a distinguished labor leader. He was invited by three presidents to the White House, and time and time again there were arranged various conferences, and he attended these conferences in the White House. Also, President Eisenhower, in 1956, a year and a half after this loan was repaid, called him because he was a distinguished citizen, and we were not trafficking here with a man who is now made the subject of [fol. 34] unwarranted inferences, of improper motives, or engaging in improper practices in this transaction; he was a man of the highest integrity, and was honored and considered as such when he was invited to the White House, as well as other places.

Now, of course, your Honor, as I started to say, under the statute there is of course the distinction which is made between malum prohibitum and malum in se, but I think that you also have to get behind the legislative history and talk about the substance of the crime which is alleged here in this indictment.

Well, everybody knows that unlike malum prohibitum, malum in se has to do with crimes that are morally reprehensible, and you do not have to go much further into the matter as to their meaning in the statute, although it is well established by the federal courts that whether malum in se or malum prohibitum, it will be strictly construed in favor of the accused. We have cited North American Van Lines v. United States, where it was stated:

> "It has long been recognized that in the construction of a penal statute, all reasonable doubts concerning [fol. 35] its meaning must operate in favor of the accused."

And in connection with malum prohibitum and malum in se, the literature with respect to it is clear that in malum prohibitum, if something happened before the thing was actually prohibited, while later on it may be made wrong, it was not wrong the day before the legislators made it wrong.

So, too, until they enacted this legislation having to do with incidents such as this, and before there developed certain labor-management practices, the legislature previously had felt that perhaps it was not wrong even to give a gift to a labor leader. Then the legislature decided in its wisdom to place certain restrictions upon such gifts to a labor leader, but until the legislature passed that act it was not morally reprehensible even to make a gift to a labor leader let alone a loan.

Therefore the rule has grown up and the cases which we have cited make it clear that when you have something that is prohibited, something which is not in itself morally reprehensible but became so because of the wording of a particular statute, the law is that you must give fair warn- [fol. 36] ing to a citizen. He is entitled to know what it is that he is being charged with. And your Honor can

well understand the purpose of that. He does not act at his peril until the legislature has given him ample notice of what it had intended to do. A citizen is entitled to know what the statute forbids and the statute must be clear and unequivocal in that respect. In other words, your Honor, a statute creating a new crime, in derogation of the common law, must give the public fair warning in clear, everyday language, of the precise acts thereby made criminal, and since the statute proscribes and punishes acts which previously had the sanction of law, it is required to give the employer a clear and unequivocal warning, and in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

Now there is one case where a malum prohibitum statute was cited, and it involved any vehicle that runs by motor and not on rails, and as your Honor knows, the Supreme Court held that that did not apply to an airplane.

[fol. 37] Now, your Honor, I am not talking only about the average layman's innocence about these things—those who have been faced with the charge of such a crime. These are men of the highest reputation and standing. I say that they have been injured far beyond anything that even an acquittal or a dismissal will do for them, but since they are charged with a crime of this nature, they must know at the time that they do the act, which was in the nature of a loan and which was repaid, they must know that it is a crime to do it, because if they had known about it they would not have done it. So, as regards the statute covering a motor vehicle that does not run on rails and that runs by motor, if the legislature meant to include an airplane it should have said so.

Similarly with the statute which says that if you carry a knife or any sharp edged instrument, by the way, malum prohibitum—just carrying it—and if the same thing were to apply when somebody is arrested for having a razor, it was held that if the statute meant that you were to be indicted because you carried a razor, then the legislature should have written razor into the statute, and not deprive an innocent citizen of his rights and place him in jail. Even [fol. 38] despite the fact that the Government brought in a number of definitions—or rather the Legislature brought

into the case a number of definitions—in standard dictionaries, which defined a razor as a knife in precise language, covering the particular kind of instrument used there, the Appellate Division of the New York Supreme Court said that they were not interested in dictionary definitions, that they just wanted to see that fair warning was given to the citizens.

So, your Honor, as I say, the cases are replete, in connection with malum prohibitum, with holdings that you must give clear warning and exact definitions.

Now let us see what this statute says. Is it clear, definite, or should the indictment be thrown out as being preposterous under the language of the statute? The statute says pay, agree to pay, or deliver. The verbs are important, your Honor. Pay or deliver a thing of value, money, or a thing of value.

You don't pay a loan; when you go out and you repay a loan, then you satisfy it, but to "pay a loan," is that language clear? When you make a loan, or when you need a loan, then you "make" it. I have never heard of such an expression, as "pay a loan," and I daresay advance that [fol. 39] that amendment, twelve years later, puts in that wording of the statute so as to remove all doubt on the subject, and I will refer to the cases which hold so.

Now, to come back to the statute, and assuming that there has not even been an amendment, just the words or the verbs "pay" or "deliver," and now they say a thing of value, pay or deliver a thing of value, now let us see. I can either pay or deliver money. I can either pay or deliver a thing of value, but I certainly can't pay or deliver a loan, because that language isn't applicable at all to it. But the Government has made this task even easier. They say in their indictment pay and deliver a thing of value, to wit, money in the amount of $200,000. They have ruled out even a semantic argument about the matter, let us say, because when you use those words and particularly considering the statute as it is worded, and then using the words "money or thing of value," if you have a loan, then you are dealing with something else than money. However, if there is to be embraced within the term "thing of value" the word "money" then it is clearly redundant. Then it is to pay money, and that is the way they would

[fol. 40] have done it, no one else has, and when the statute says what it does, does the statute mean that? Is that fair warning? Do you deliver a loan when you make it? You certainly do not. You don't deliver anything, and if the statute wanted to say that or to use language that would include a loan, it would have so indicated. We set forth those cases in our brief, showing they certainly knew how to do it, when they so intended.

Here, for example, is another specific example: offer or make, offer or make a loan, offer or make a loan. Well, that is specific. This is specific enough for my purposes, and my purpose is that——

The Court: Was that the bank examiner's case. I think it was, wasn't it?

Mr. Nizer: That's right.

And we have also cited the case of Burgess vs. Salmon in our brief, which is another good illustration and interpretation of the 1959 amendment, and which is the case, your Honor, that I have just referred to.

I am going to leave the amendment for the moment because even without amendment I think this would be doubly clear, and I need not emphasize in because they [fol. 41] say to pay or deliver a thing of value, and that ought to mean something else than money, but no, they say, to wit, money in the amount of $200,000.

Well, in a situation such as is involved in that case, your Honor, I do not hesitate to say that it is against the Government, but I think that is the fault of the indictment aside from the statement indicating that it was money and, therefore, not possibly a loan.

And among the cases, your Honor, dealing with fair warning is the Cardiff case, cited in my brief, and the case dealing with the delivery of a telegram, where the Court said that if Congress intended to say so they should have said it.

[fol. 42] Your Honor will also recall that the obscenity statute read "if you send any writing", among other things, and they sent a letter. If Congress meant to say a letter, they could have put in the world "letter". Even though it is a writing, it means something else. You have to give the most explicit warning, and that is the standard

which I think goes to the heart of the case, fair warning. The very thing which I think makes this an outrageous indictment is to say that these two men—I represent Roy Fruehauf, but I put Mr. Seymour in exactly the same classification—neither of them ever had any difficulty in their lives; they both have excellent reputations—to say that these two men were guilty of a crime—when I saw these men downstairs fingerprinted it broke my heart—on the ground that they should have known under this statute that a loan arranged with the bank at four percent and repaid is a crime. It is really outrageous, your Honor.

Now I am going to skip the rest of my argument which is contained in Part I of our brief. Twelve years after, in 1959, after the McClelland hearings were held, there was an amendment to this statute. It is important to note the [fol. 43] background of that amendment, your Honor. It bears forcefully on this motion. In the McClelland hearings, which were designed to examine Mr. Beck, they were investigating his various affairs, these two men were drawn in. Anything that Mr. Beck had done, no matter how innocently—and I want to say clearly here I hold no brief for Mr. Beck, but I think he was just as innocent as these two men are in this transaction—but under those circumstances these men were drawn in. They had no idea they were going to get into trouble. They were innocent in their own minds and hearts. Senator Kennedy actually said, "Now I know this is no violation of law," talking to my client, and you haven't done anything legally wrong. That comes from the official minutes. I know you haven't committed any violation of law, but do you think it was morally right for you to do this?

My client, "I did nothing morally wrong. I had nothing to do with labor. He had given me a million and a half dollar loan through union funds, an open transaction, made by the lawyer for the union and the financial officer, documents are in existence, four percent interest."

[fol. 44] When Mr. Fruehauf was in trouble in his company Mr. Beck befriended him, saying "The union might make you a loan" and the union made a good loan for $1.5 million to Fruehauf, which was paid back at four percent interest. That was all before the Senate Committee.

Now, naturally, he felt friendly toward the man for sav-

ing his company. He had to fit for its existence and Mr. Beck befriended him. It was union funds, but nevertheless it wouldn't have happened unless Beck called the union's attention to it, so he was grateful to him.

Consequently, within a month thereafter Mr. Beck, for reasons I don't know, said, "Can you help me place a loan for $200,000?" If he had the money personally, he testified, he would have given it to him right then and there, probably without interest, but he didn't have it. Mr. Seymour said, "I think I can place it in the Manufacturers Trust."

Now, when Senator Kennedy and several other senators had said, "Of course it isn't any violation of law, but do you think it is right to do this?" they were thinking of future legislation. As a result of that, as the Congressional hear- [fol. 45] ings show, they said, "We think we ought to be told about this from now on." So they amend the statute twelve years later with the words "thing of value". Henceforth no one can doubt it. Under the authorities, the Ryan case and the other cases, if a person you are lending money to, not because he was a labor leader, but because he was a brother-in-law or particular friend and it didn't affect labor, even then I don't think that would be a violation, but we don't have to conjure up that situation.

Now what do the courts hold? I shall be brief and not elaborate because your Honor is familiar with this. What do the courts hold is the effect of an amendment of the statute? Simply this: where a statute is amended to include a loan, it is a conclusive presumption that the statute prior to the amendment did not include loans. In this case that presumption becomes the final construction that is irrefutable because the very language of the people who wanted this amendment was that "This is not provided for, and we had better provide for it; we had better make the statute tougher." They wanted to make it tighter. Therefore we no longer need debate between counsel as to the interpretation of it. We now have the legislative enactment saying [fol. 46] that this wasn't a crime before but they have made it so in their amendment of 1959, twelve years after the statute was originally drawn. And the cases on that proposition are that the Constitution provides that a man may not be tried for a crime which was not a crime retroactively at the time he performed the act.

So I conclude, your Honor, resting upon our brief for further illustration, that as a matter of substantive law there is, first a fatal variance in the indictment, and I urge dismissal of the indictment.

Aside from the variance, it is now conceded that this was a loan transaction which was not a violation of Section 186(a) and (d) by any of the defendants.

I have other motions addressed to the statute of limitations, but there again, since I haven't had the benefit of the Government's brief, I shall, with your Honor's indulgence, reserve my right to make such motions if your Honor will permit me at another time, if it is necessary at all, and move further with respect to this matter.

The Court: I am going to declare a ten-minute recess and I am going to inquire of the other defendants when I [fol. 47] return whether they join in the application. So you should have time to make up your minds as to whether you want to be participants in the motion made by the defendant Fruehauf.

(A short recess.)

JOINDERS IN AND FURTHER ARGUMENT IN SUPPORT OF MOTION TO DISMISS INDICTMENT

The Court: Mr. Seligson, does the defendant Fruehauf Trailer Company join in the application for a dismissal of the indictment?

Mr. Seligson: Yes, your Honor.

The Court: Do you wish to add anything to what has been said by Mr. Nizer?

Mr. Seligson: No, your Honor. There is very little if anything that I can add to the argument advanced by Mr. Nizer in support of the motion to dismiss on that ground. The motion, I take it, is made upon the basis of the indictment and the conceded facts as read by your Honor into the record?

The Court: Yes.

Mr. Seligson: And the motion is twofold? The motion, as I understand it, is to dismiss because the statute did not contemplate and did not cover a loan, and, two, because there is a fatal variance between the indictment and the facts as conceded.

The Court: Yes.

[fol. 48] Mr. Seligson: There is nothing further I can add, your Honor.

The Court: Mr. Vance, on behalf of the defendant Burge Seymour, do you join in the application?

Mr. Vance: Your Honor, I do join in the application.

The Court: Do you wish to add anything?

Mr. Vance: Very briefly, your Honor.

Mr. Nizer has very eloquently stated the law with respect to this matter, but there are one or two points which I would like to touch upon and perhaps underline.

First, I will not dwell on the facts at all except to comment briefly on the statement by the Government that the interest was not paid. As far as Mr. Burge Seymour is concerned and Brown Equipment Company, I think the Government will concede that the interest was repaid in full.

Mr. Guzzetta: I don't concede any such thing. My reference was to the interest to be paid by Dave Beck, and I didn't concede it was paid in full; quite the contrary.

The Court: Did you intend to intimate that the interest had been paid by Mr. Beck?

[fol. 49] Mr. Vance: I believe I did, if your Honor please.

The Court: Well, that is not what the Government——

Mr. Vance: I believe I was just trying to straighten out the records, your Honor.

The Court: But I want the record to show what I read from the Government's memorandum spoke of the interest from Dave Beck and not of the interest to the Manufacturers Trust Company.

Mr. Vance: Your Honor, I think that this is really not relevant. I merely tried to straighten out the record on that point.

I would now like to turn to the sole question here at this time and that is a question of law. First, were loans encompassed within the meaning of Section 186(a) at the time of the acts charged in the indictment? Second, whether or not a reasonable ordinary man was given fair notice that such a crime might be charged under that statute. I think the answer must be a ringing no to both of those legal questions.

First, as Mr. Nizer has pointed out so eloquently, the plain meaning of the words of the statute does not include [fol. 50] "loan." An ordinary common man could not possibly on reading that statute have learned or had been put on notice that a loan was prohibited by this statute.

As Mr. Nizer has pointed out, it is a malum prohibitum statute. In such case the requirements laid down by the courts long ago and adhered to ever since say under the circumstances the ordinary man must be given fair warning if he is to be held.

Now, your Honor, this is not simply a canon of statutory construction; it is a principle of constitutional law, and the courts have held that where a statute is so vague as not to put an ordinary reasonable man on notice, that to forbid such action would be a deprivation of due process under the Fourteenth Amendment to the Constitution of the United States, and if there had been any question——

The Court: Well, may I interrupt to inquire whether the thrust would be under the Fourteenth Amendment in this court or under the First Amendment?

Mr. Vance: I think it would be under both, your Honor, and the Fifth and Sixth as well.

The Court: I should have said the Fifth instead of the First.

Mr. Vance: Yes. Now, if there had been any question, [fol. 51] which I don't think there was, it certainly was laid to rest when Congress last year, in 1959, closed this loophole in the statute.

I want to refer very briefly to one or two statements made at the time the Congressional hearings were on, when this amendment was effected.

Senator Barry Goldwater, who was a member of the McClellan Committee and who sat and heard all the testimony testified to in due course on the particular transactions which are the subject of this indictment, had this to say speaking before the House of Representatives on a companion bill (reading,.

So this emphasizes the fact, your Honor, that here one of the men who was in Congress at the time of the initial enactment and who heard all of this testimony believed that loans were not covered, and this was adding a new prohibition to cover them.

It is interesting to note, your Honor, that 163 members of Congress who enacted the 1959 amendment were also members of Congress at the time the 1947 act was adopted, and the Congressional history shows that not one of them raised any question as to whether the original statute had included or proscribed loans. I think that is eloquent evi- [fol. 52] dence of the fact that Congress clearly believed that loans were not included in the original 1947 act.

Finally, the cases are clear, crystal clear, your Honor, that where there is a loophole in a statute and that loophole is closed by subsequent enactment of legislation, there cannot be an indictment or conviction under the previous statute which did not include the language that has been filled by the loophole.

That is all.

The Court: Mr. McCreedy?

Mr. McCreedy: On behalf of Brown, your Honor, I wish to join in the application to dismiss.

The Court: Do you wish to add anything to the argument?

Mr. McCreedy: Well, no, I will not add anything.

The Court: Mr. Burdell?

Mr. Burdell: Yes, your Honor, I join in the motion.

First, Mr. Beck is indicted under a separate count in the indictment. Nevertheless, I am sure that there can be no dispute concerning the fact that the argument which Mr. Nizer has made and which Mr. Vance has made and [fol. 52a] in which other counsel have participated and concurred also relates to count two of the indictment.

I should tell the Court that with respect to the memorandum of law which I submitted to the Court today, no cases or authorities have been added, but on the contrary, on this particular point, the defendant Beck has adopted the memoranda submitted by the other defendants, and I adopt the argument made by Mr. Nizer and Mr. Vance.

I would simply like to add this thought, your Honor, particularly with respect to the question of the loan transaction, whether or not that is encompassed within the scope of the act. The Government's judicial admission is, if I understand it, to the effect that Mr. Beck paid some interest; they say he didn't pay all the interest. I believe the Government is incorrect, inaccurate in that, but nevertheless

they do concede that he did pay, I believe, $4,000 by way of interest.

Now in that connection I am reminded of the statement that many years ago was made by Calvin Coolidge in connection with loans from the United States to European countries during the First World War, where he said those [fol. 53] countries hired the money, and in effect that is what Mr. Beck did, whether he paid one percent interest or two percent interest or four percent interest or whatever interest he paid or even if he only paid a portion of the interest. He hired the money for $4,000.

Now I see no difference in that situation or between that situation and the situation which would arise if, for example, he went down to the Fruehauf Trailer Company and hired a trailer for his use for some peroid of time. The Government's theory, as I understand it, is that because he hired the money, he had the use of the money during a period of time, that that was a thing of value. Now, of course, if he hired a trailer for a period of time and paid for it, he would have had the use of the trailer. Presumably the trailer to some degree would have been a thing of value, but it certainly would be ridiculous, I think for anyone to argue that the hiring by Mr. Beck of a trailer and the using of a trailer would constitute a violation of this act. So, by the same process of reasoning, which I believe is logical, it is ridiculous to argue that the hiring of the money, in paying $4,000 for it, is a thing which vio- [fol. 54] lates this statute.

In addition to that, I want to say to the Court that I am extremely impressed by the argument and the idea of variance in the indictment. It seems to me that the Government's brief in effect constitutes an amendment of the indictment, which, of course, cannot be done under the old decision of ex parte Bain and subsequent decisions. Here Mr. Beck is charged with receiving money. Nothing is said about a loan, and as late as last night in a conference, a brief conference I had with one of the other counsel, I was wondering what the Government was going to do about this question of loan. I was wondering if they were simply going to prove that the defendant Beck received $200,000 from the Brown Equipment and Manufacturing Company and rest and leave it to the defense to prove that the money

was repaid. I was wondering if they were going to take some position, perhaps, that the loan was a sham of some sort. Under the indictment it says that he just received the money. That seemed inconceivable to me, that the Government would now come in and say, "Well, he didn't just receive the money. Actually what he did was hire the money" and so under those circumstances I believe [fol. 55] there is a fatal variance, because, just suppose we go to trial on this case on the Government's theory that this was a loan and suppose there was a verdict of acquittal. I see nothing which would prevent the Government from turning around tomorrow and indicting these same defendants and then taking the position that it wasn't a loan, but it was a sham arrangement, or adopt some other theory, so that we have to try this case twice.

The Court: Well, Mr. Burdell, let me interrupt. You are excluding the statute of limitations when you make that statement?

Mr. Burdell: I am excluding the statute of limitations, yes, your Honor, but I don't believe that the effect of the statute of limitations has any effect on the question of whether or not——

The Court: That's right. I understand that.

Mr. Burdell: That is all I have to say, your Honor, except that I reiterate that I fully adopt and concur in the argument made by Mr. Nizer and Mr. Vance, and I believe those arguments are expanded in emphatic and extremely persuasive detail in their briefs, and I adopt the arguments and the briefs too.

The Court: If I am correct, I have now on the record an agreement by every defendant to join in the application [fol. 56] to dismiss the indictment.

Mr. Sullivan: I think you have omitted Associated Transport, your Honor.

The Court: I beg your pardon, Mr. Sullivan.

Mr. Sullivan: I concur in what you said. I join in the motion. On behalf of Associated Transport I concur in the argument and I adopt all the grounds.

The Court: Thank you.

Now I have covered all the defendants. I will now ask the Government if it wishes to be heard in opposition.

Mr. Guzzetta: Yes, it does, your Honor. I think at the outset I can say that undoubtedly I can't match Mr. Nizer in eloquence but I can present my argument more elliptically than he did.

As I understand his argument and the arguments advanced by the other co-defendants in this case, you can bring them down into three categories. First, does the indictment spell out a crime, which is really what we are talking about when we address a motion to the indictment at this stage of the trial. I think, your Honor, we are limited to the four corners of the indictment, although you [fol. 57] may disagree with me on this point——

The Court: Very strongly.

Mr. Guzzetta: Because my brief is only—the first three or four pages which your Honor read from——

The Court: The first three or four pages dealt with what you promised to prove, the facts.

Mr. Guzzetta: Precisely, as supplemented by my statement in case there was ambiguity. I don't know that an assistant United States attorney ever bound the Government before like this.

The Court: Well, Mr. Guzzetta, I have had the experience where a man got up before a jury and got kicked out on his opening statement.

Mr. Guzzetta: That is a different matter. My opening statement is yet to come.

The Court: In this case it may never come. We will see.

Mr. Guzzetta: Your Honor knows I don't——

The Court: I don't know yet. I am waiting to hear your persuasive argument.

Mr. Guzzetta: Thank you, your Honor.

The second argument that Mr. Nizer has made and the [fol. 58] co-defendants have adopted is whether or not my judicial admission made it a loan, that I call this a loan and thereby bound the Government to this theory and that it constitutes a fatal variance when compared with the indictment.

Third, I take it, is whether or not the statute is unconstitutional by reason of vagueness, the argument of Mr. Vance articulated by him a few moments ago.

I shall address myself to these three points: first with respect to the four corners of the indictment. The indictment is a very simple document, your Honor. It charges precisely what I said in the first few pages of the memorandum, that three corporations, three corporations which employed teamsters who were represented at the time in June of 1954 by Dave Beck, who was the president of the International Brotherhood, that these three corporations implemented by their principal officers, gave $200,000 to Mr. Beck.

The second count says Mr. Beck received the $200,000. On the basis, your Honor, the four corners of the indictment, I submit match rather squarely with the statute. I won't take the time to read the statute which Mr. Nizer excerpted, but I would simply say that 185(b) and (c) [fol. 59] provide practically identical language, that is the indictment follows the language of the statute practically identically.

The Court: Pardon me. Is there an inadvertent omission in the indictment or did you misspeak yourself when you said 186(b) and (c)? The statute cited in the indictment is 186(a) and (d) and, of course, Section 2 of Title 18, which is aiding and abetting.

Mr. Guzzetta: 186(a) and (d).

The Court: You said (b) and (c).

Mr. Guzzetta: I didn't mean that.

The Court: You didn't intend to mention 186(c)?

[fol. 60] Mr. Guzzetta: No. 186(a) and (B). From the four corners of the indictment which Mr. Nizer rather assidously avoided, although I think he did paraphrase it to some extent, we go on to the second question, and that is whether or not there is any fatal variance between it and what the government has said it intends to prove in this case, and I submit that that is supplemented by what I said a few moments ago about what is charged. Now, what they have said is this, and I think, your Honor, when you look at it, at the final nub, core, of their argument, I must say I think it is not an argument which rises to the dignity of logic, even though Mr. Nizer said it was enthroned by reason. They have said in effect that when we charge that this transfer was made and later on talk about a loan that we have prejudiced the defendants to such an

extent that they can't reply to this indictment, that they can't build and prepare a defense in a court of law, that they don't know what they are being charged with precisely and that, perhaps, I think Mr. Burdell finally mentioned that perhaps they are being subject to double jeopardy. Nothing of the sort is there. It is matter of logic. What we charge is what happened on or about June 21, 1954, not what happened thereafter. Your Honor, if it [fol. 61] be a loan, or if it be a repayment without other attributes of a loan, is a matter quite immaterial to the government's case, and quite immaterial to the indictment. As a matter of fact, Mr. Nizer made something of a big matter out of providing us with all this information. All the information that the government has in the case is information provided by the defendants, taken from the defendants' books and records and supplemented and underscored by statements and admissions made by the defendants. But I think this argument about variance, your Honor, even if there could be, although I don't think there is, a technical variance between what the government intends to prove and what is stated in the four corners of the indictment, is an argument, your Honor, I submit, that holds no water whatsoever.

The Court: Mr. Guzzetta, may I interrupt to inquire about something?

Mr. Guzzetta: I wish you would.

The Court: Assuming that this case was tried and the Court was disposed to frame special interrogatories to the jury, and one of those interrogatories was, Was the transaction a loan, and the jury brought back the answer No: do you think the Court could allow that answer to stand on the basis of the facts as you have set them forth in your [fol. 62] brief, or wouldn't the Court have to set aside the finding as being contrary to the evidence and the weight of the evidence?

Mr. Guzzetta: Your Honor, in the context of the remarks I made after you read in open court my brief, I would say that that would not be an erroneous finding by them.

The Court: In other words, your position is that despite the facts which you set forth this could be held to be not a loan? When I say the facts you set forth, I mean the facts in your memorandum.

Mr. Guzzetta: As I tried to indicate, and I can answer that, and I will with Yes or No—what I tried to indicate was that the government's position is twofold. If it wasn't a loan, if the jury determine on the basis of the facts which they hear that this was—that the outer clothing, fabricated by one highly complex intercorporate transaction, didn't make this transfer a loan, clearly, it would come within the statute. There would be no problem in my mind at all. Secondly, if the jury decided that it was a loan, I wouldn't say that that would preclude them from finding a verdict of guilty because, as I am about to go into, a loan is encompassed under the statute prior to amendment, and I am [fol. 63] going to use Mr. Nizer's authority.

The Court: As a thing of value.

Mr. Guzzetta: Yes, as a thing of value.

The Court: I thought that was the thrust of your argument.

Mr. Guzzetta: I think it could be said, use of the money.

The Court: Yes.

Mr. Guzzetta: Yes, and the transfer under those circumstances specifically set forth in the indictment sufficiently apprise the defendants of what we were charging them with.

Now, the last question is whether or not the statute is unconstitutional for vagueness. Mr. Nizer elaborately tied that in with the question whether or not the ordinary reasonable person could understand that what he was doing was a crime.

Now, there are two factors that have to be taken into consideration. First you have to look at the statute, what it prohibits, what the interdictions of the statute are, and you can't just look at that phrase, thing of value, and say, "For heaven's sake, that is too broad; certainly a reasonable man couldn't understand it." And you have to take [fol. 64] a look at what the defendants did, and I think Mr. Nizer was explicit in setting forth the additional facts your Honor should consider in this matter. Here we have Roy Fruehauf, president of a corporation he has admitted to be one of the largest trailer companies in the nation, probably in the world. I think it would be fair to call him a good business man. Burge Seymour, president of Associated Transport Company, one of the largest truck manu-

facturers in this nation. I think it would also be fair to call him a good business man.

The Court: Did you mean to say truck manufacturer?

Mr. Guzzetta: Associated Transport.

The Court: Did you mean to characterize them as manufacturers?

Mr. Guzzetta: Truck concerns, excuse me. If I said manufacturers I didn't mean that. These two business men, Mr. Nizer would have us believe, did not consider giving $200,000 to Mr. Beck for approximately a year to be something of value.

Now, the fact is, as well as the logic, your Honor, and I am not going into what would be consideerd a captious argument about the interest not being fully paid, or the fact that there wasn't any security by Beck for this $200,- [fol. 65] 000, or the fact that they couldn't get it from a bank for the first six months; they tried first to get it from a bank and they couldn't. So they went and used the corporations which they controlled, and this, your Honor, is where they ran afoul of the law, but I don't want to emphasize that——

The Court: Just a moment. You have confused me. The statute upon which this indictment is predicated says it is a violation of the law because the corporations made the loan, because they had dealings with the union?

Mr. Guzzetta: Because the corporations are employers of employees in an industry affecting commerce. I say the facts, because the logical argument, that I have just enumerated briefly, belie this contention. The fact of the matter is that Fruehauf himself has admitted, and the government will read his admission into the record, that he was doing a very considerable favor for Mr. Beck. Now, tied to this, Mr. Nizer mentions some things which occurred to him as being shocking, and I think when he made reference to the indictment filed—presented by the grand jury he uses the word deceptive as well. Referring now to the statute before it was amended, what the statute means, [fol. 66] I think the government has precedent both ways, both before and after the amendment. Mr. Nizer mentioned the Ryan case by specifying Judge Learned Hand's dissenting opinion and then went on to say quite clearly that this was the opinion which the Supreme Court in

reversing the Second Circuit's reversing the Ryan conviction adopted. They adopted Judge Hand's opinion. So it is good precedent. What is shocking about this matter is the way Mr. Nizer abuses precedent which he cites.

This is precisely what Judge Hand said in discussing as to what Congress wished to do when it enacted Section 186, Title 29:

> "Congress wished to prevent employers from tampering with the loyalty of the union officials, and disloyal union officials from levying tribute upon employers. The first was the situation at bar; the employer did not bribe the accused;"

Mr. Nizer said that Ryan involved a brazen bribe complex of fact.

> "it did what has been done, time out of mind, when one person, knowing that he is likely to have continuous dealing with another in which the second person will be acting as a fiduciary, wishes to insure a friendly approach to the fiduciary; and makes him presents [fol. 67] or does him favors, or in other less palpable forms tries to turn the edge of his allegiance."

This is what the statute, in the view of Judge Learned Hand, subsequently adopted by the Supreme Court, was intended to prohibit.

And then considering the fact that the $200,000 transferred involved a period of over a year before it was finally repaid by him under the circumstances that I have already enumerated, and which I shan't emphasize by repeating them again, it is probably ironical, but it is the same wording that Mr. Fruehauf has used before the Senate Committee; the defendant has commented "That's right," he said, "I did him a very considerable favor."

Now, I will finish up with this thought, coming to the statute as it was afterwards amended. The amendment does include, of course, words which were not included in 186 before amendment, and the defendants would have your Honor reason that because now the statute includes such words that it is not to be assumed that a loan is subsumed under the terms "other thing of value" before it was amended.

Now, that is what he says, and I think on its face it is a [fol. 68] logical fallacy, and I think I can establish in logical terms that it is a fallacy, termed (and this is not an anatomical reference) in logic the fallacy of the undistributed middle.

There is a general provision in the statute both prior and subsequent to the amendment related to "other things of value;" and I have already discussed the question and I shall not go into that now.

Counsel also enumerated some of the things that he contends may or may not have been included in that phrase "other thing of value," as analogies. But I think that simply because after the amendment the statute includes the word "lend" does not mean that this was not included in the phrase "other thing of value" prior to amendment.

In the first place there is no logical connection between those conclusions at all. It is simply what defense counsel urges your Honor to infer from what he has stated, and what I submit is not correct, in logic your Honor; because there can be any number of reasons why Congress later amended the statute and then decided to put in, as well as other additions, the word "lend" to supplement "other things of value."

Mr. Vance argued on the basis of the legislative history [fol. 69] of the amendment, but I do not think it is necessary at this time to analyze that legislative history because, at least in this regard, there is no ambiguity. Nevertheless, your Honor, if you consider the omnibus phrase ambiguous, I would like to have the opportunity to do this: To submit to you an analysis of the legislative history. I think your Honor will find that what the Congress was doing, after the amendment, was to include the intention of Congress to have the statute apply to a broader category of recipients—or middlemen—and not to specify lending which had not been included theretofore. In any event, I believe I can submit at least some persuasive authority on that basis. Now more particularly, there is one case, the type of case involving a matter of the kind involved here—a loan—and it is a case in the Northern District of New York, United States v. Golden, where the District Court said, and I would like to read to you, if your Honor please,

what the Court said in that case relative the question of whether a loan is a thing of value:

> "It is urged that a strict construction of the statute is required under circumstances where as here an act not unlawful in itself is prohibited by Congressional enactment."

[fol. 70] The facts in this case involve the lending of a tugboat to a union official.

> "It is further urged that since the above sections were amended in 1959 to make the act of lending by the employer and a receipt or acceptance of a loan by the representative a violation of law; that such amendment is an indication that the making of a loan of a tugboat by the employer and the acceptance of the loan by the representative were not included as unlawful acts under the sections as they stood when the defendants were charged to have violated same."

Well, your Honor, the Court rejected the defendant's argument that the statute should be strictly construed to exclude loans and said that it should be interpreted to effectuate its purpose, which is to prevent the granting of favors by an employer to the union representative of his employees.

The Court went on to say:

> "No doubt defendants' argument urging a strict construction of the statute as typified in U.S. v. Reese, 93 U.S. 314, runs counter to the proposition that a remedial statute may not be construed "in complete disregard of the purpose of the legislature" (U.S. v. [fol. 71] Brumblett, 368 U.S. 503 at 510). No extended discussion of the statutes involved here is necessary. The Supreme Court in U.S. v. Ryan, 350 U.S. 299 and our own circuit court in U.S. v. Ryan, 232 P. 24 481 appear to construe the sections involved broadly so as to prevent the granting of favors by an employer and the receipt of same by the representative of labor. (See also Arroyo v. U.S., 955 F. 2d 349). Reversed on other grounds 359 U.S. 419."

That, your Honor, concludes my reply.

[fol. 72] The Court: Mr. Guzzetta, don't you think that there might be a distinction in the statute that talks about deliveries of moneys, or another thing of value? That is, that there might be a distinction between the delivery of money and the delivery of a tugboat?

Mr. Guzzetta: Because you have in the one instance, your Honor, a tangible thing and in another instance a loan?

The Court: Yes.

Mr. Guzzetta: No, sir. I do not feel that the distinction so made is a meritorious one.

ORAL RULING GRANTING MOTION TO DISMISS INDICTMENT

The Court: Well, that is consistent with your argument that the use of money is another thing of value, but, of course, the defendants argue to the contrary, that the intention under the old statute was that another thing of value meant something tangible and something physical.

Now, in the light of the fact that you and Mr. Nizer have raised the question as to the nature of the motion and whether it is confined to the four corners of the instrument, and I have already indicated my disagreement with you on that, I think no harm can be done if we go [fol. 73] into this question by way of a preliminary discussion because I think it is going to collaterally raise a lot of peripheral questions that are involved in this motion.

But before doing so I am going to address myself, until such time as I indicate to the contrary, to that branch of the motion which seeks a dismissal of the indictment because it fails to charge an offense. I will later on allude, I expect, to the questions of variance, the statute of limitations, venue, and vagueness, but for the time being I am addressing myself to what I consider to be the bellwether of the motion presented, i.e., whether this indictment charges an offense.

On the question of where the Court may roam in determining a motion of this nature, I think we have to go back into the procedural history a little bit, and I am not completely convinced that my approach is right. However, I have many companions in the doubt, men of eminence, so I do not feel embarrassed with the fact that I must confess that I may be wrong.

This motion, if it is to be entertained at all, must be

entertained under Rule 12 of the Federal Rules of Criminal
[fol. 74] Procedure. Now, Rule 12 provides in subdivision (a) that the pleadings in criminal proceedings under modern practice technique are now reduced to the indictment or information, the pleas of not guilty, guilty and nolo contendere.

And then comes the very troublesome sentence "All other pleas and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these Rules."

Now that would be assumed to mean that the old demurrer, the old plea in abatement, the old plea in bar, were all gone, but still the other period does still haunt us because there is the one thing that is obvious and that is in determining what we are now pleased to call a motion to dismiss, we have to go right back and discuss the demurrer, the plea in abatement, the plea in bar, and, as I will point out later, that becomes very important with respect to the jurisdiction on appeal under the Criminal Appeals Act.

In any event, subdivision (4) of Rule 12 makes provision for a hearing on a motion to dismiss.

[fol. 75] What does it say? And, incidentally, it is only a restatement of what the practice was under the old proceedings. In the case of a demurrer under the old proceedings no hearing was necessary because you would address your opposition to the face of the pleading, and where you are talking about the demurrer being brought on now under the motion to dismiss the indictment, Mr. Guzzetta, I agree with you that you address yourself only within the four corners of the document, but when we go beyond the demurrer and we get into the plea in abatement, and the plea in bar, I deferentially indicate, sir, that you have completely misconstrued the law because the Court is charged with the responsibility of holding a hearing, and that is what we are doing now, and in a moment we will address ourselves to the extent of any hearing to be held. In any event, subdivision (4) of Rule 12(b) of the Criminal Rules provides:

> "A motion before trial raising defenses or objections shall be determined before trial unless the court

orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be [fol. 76] tried by a jury if a jury trial is required under the Constitution or an Act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

So under the present modern practice bottomed upon the practice as it used to be with respect to the various pleas addressed to an indictment, or as a basis for the quashing of an indictment in those days, there has to be a hearing, and accordingly that contemplates going far beyond the four corners of the document, and, as the old cases pointed out without any question in my mind, where you have what is now in the nature of a plea in abatement, or in the nature of a plea in bar, you may and you must take extrinsic proof.

Therefore, in the light of this motion—and let me say parenthetically or go back again to subdivision (2) of Rule 12(b), which has reference to "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during [fol. 77] the pendency of the proceedings." And I believe it has been held that that even means in the Court of Appeals or the Supreme Court. I believe that sentence means that the court of its own motion, if it felt that there was a lack of jurisdiction, or the failure to charge an offense, should raise it, but I am not compelled to get to that point here because the defendants have raised it by a specific motion.

In any event, as I construe Rule 12, it would require, and I am still addressing myself to that one basis of the motion, i.e., the failure to charge an offense, a hearing to determine whether the transaction was a loan, and then upon that resolution to decide whether or not a loan was violative of the statute as it existed at the time the transaction took place. Happily, in my view of the Government's brief, I need not hold a hearing to adduce any proof because, as I have already indicated, I am convinced that the language which I read into the record from the Gov-

ernment's brief is a judicial admission that this transaction was a loan. I have no doubt in my own mind at least, that in a trial either to the court or the jury, in a preliminary hearing where the defendants have not yet subjected themselves to jeopardy, if the Government established the [fol. 78] facts which it recounted in its brief that it intended to prove, a finding by a jury to the contrary would have to be set aside, nor could the Court find to the contrary. Those facts, in my view, notwithstanding the qualifications attempted orally, and despite those qualifications and accepting those qualifications, those facts, in my view, establish that the transaction was a pure and simple loan.

Now I think this obviates the necessity of a hearing with or without a jury on the question.

We now come to the next step. Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not. I reject the argument that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that which I take it the Government urges was manifest before. I am, therefore, of the opinion [fol. 79] that on the extrinsic evidence offered to be introduced by the Government and its judicial admission the transaction was not an offense contemplated by the statute as it existed at the time.

Now what is the effect of the holding? Obviously the defendants have not been put in jeopardy because this is a preliminary hearing. I think it was wise that this basic question be presented for resolution before the commencement of the trial.

Under the Criminal Appeals Act, which is now found in 18 U.S. Code, Section 3731, we find that the court's intended course is exposed for consideration by two paragraphs of the Criminal Appeals Act. The first of the considerations is the second paragraph of Section 3731 of Title 18 which reads—and it speaks, of course, of those cases where an appeal may be taken from the district

court's decision directly to the Supreme Court, and it reads:

> "... from a decision or judgment setting aside or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon [fol. 80] which the indictment or information is founded."

The second area of the statute which comes into play is the fourth paragraph which provides also for direct appeal from the district court to the Supreme Court "from the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Thus the Government has now available to it, and it must act under the Criminal Appeals Act within thirty days, an opportunity when the Court rules as has been indicated, to have determined by an appeal directly to the Supreme Court either as a construction of the statute, or as the granting of a plea in bar; the validity of the Court's ruling.

I am now granting the motion of all defendants to dismiss the indictment upon the ground that it fails to charge an offense of the statute as it read at the time the transaction occurred.

In the light of that ruling I see no necessity to rule upon the remaining questions raised, to wit: variance, the effect of the statute of limitations, the question of venue, and the charge of vagueness of the statute.

The indictment accordingly, and for the reasons ascribed [fol. 81] is dismissed.

Mr. Nizer: Judge, may I ask your Honor that the defendants be discharged from bail? There is $5,000 bail, and this being a misdemeanor count, the amount of bail in all events was a very minor one, and by virtue of your Honor's ruling now made may I ask that bail be dismissed. The defendant whom I represent, Mr. Fruehauf, will at all times be available to the court as he has been in the past I can assure your Honor.

The Court: Well, Mr. Nizer, may I inquire of Government counsel whether the Government intends to prosecute an appeal.

Mr. Guzzetta: I intend to take the matter up with the Department of Justice immediately, your Honor, in whose hands the authority in such cases rests and will rest in this case, and not in mine.

The Court: Mr. Nizer, I point out that the Criminal Appeals Act contains another section which may come into play and does not at this moment, and it refers to the prosecution of an appeal such as this to the Supreme Court directly or to the Court of Appeals, in which instance the defendant would be admitted to bail on his own recogni- [fols. 82-83] zance. In other words, the statute precludes even the matter of bail once an appeal has been taken.

Now I will go along to this extent. I will continue the bail of any defendant under bail until such time as the Government takes an appeal, and in the event that the Government does take an appeal, the defendants then may be discharged in their own recognizance under the statute.

Mr. Nizer: Thank you, your Honor.

(Hearing concluded.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 84] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. CR. 159-138

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 18, 1960

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered February 18, 1960, dismissing the indictment, which charged the defendants with violations of Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. 186.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

1. Transcript of docket entries.
2. Indictment.
3. The entire transcript of the proceedings on February 18, 1960 (this includes the defendants' oral motions to dismiss and the district court's oral order dismissing the indictment).
4. This notice of appeal.

[fol. 85-86] III. The following question is presented by this appeal:

Whether the payment of money by an employer (of employees in an industry affecting commerce) to a representative of his employees, intending repayment of said money with interest, is within the proscriptions of Section 302(a) and (b) of the Labor Management Relations Act, 1947, 29 U.S.C. 186, making it unlawful for an employer to pay or deliver to a representative of his employees, and for such representative to receive or accept from the employer "any money or other thing of value."

/s/ S. Hazard Gillespie, Jr., United States Attorney.

March 18, 1960.

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 87] [File endorsement omitted]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AUTHORIZING TRANSMITTAL OF ORIGINAL RECORD—April 15, 1960

Upon the annexed affidavit of John A. Guzzetta, Assistant United States States Attorney, duly sworn to the 14th

day of April, 1960, and upon the Notice of Appeal of appellant, United States of America, filed herein on March 18, 1960, and upon all the papers filed and proceedings had herein.

Now, upon motion of S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, attorney for the United States of America, it is hereby

Ordered that, pursuant to United States Supreme Court Rule 12(4), the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Supreme Court of the United States all original papers filed in the Office of the Clerk of this Court which are specified in the designation of appellant, United States of America, as contained in its Notice of Appeal; and it is further

Ordered that said records be safely kept by the Supreme Court of the United States and that they be returned [fol. 88-90] to the Clerk of this Court upon the conclusion of this appeal.

Dated: New York, N.Y., April 15, 1960.

Charles M. Metzner, U.S.D.J.

[fol. 91] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Herbert A. Charlson, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the papers transmitted herewith, numbered 1 to 90, inclusive, comprising original filed papers, constitute the record on appeal in the above-entitled matter as designatd by the appellant, United States of America. The appellees have not filed a cross-designation, and the time within which to do so has expired.

The original filed papers are transmitted herewith in lieu of transcript of record on appeal, pursuant to the order of United States District Judge Charles M. Metzner, dated April 15, 1960.

In Testimony Hereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 18th day of April in the year of our Lord, one thousand nine hundred and sixty and of the Independence of the United States, the one hundred and eighty-fourth.

Herbert A. Charlson, Clerk, By Raoul Brugo, Deputy Clerk, U. S. District Court, Southern District of New York. [Seal.]

[fol. 92] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1960

No. 91

UNITED STATES, Appellant,

vs.

ROY FRUEHAUF et al.

Appeal from the United States District Court for the Southern District of New York

ORDER NOTING PROBABLE JURISDICTION—October 10, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

TILE COPY

FILED
MAY 16 1960
JAMES R. BROWNING, Clerk

No. 94191

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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MALCOLM RICHARD WILKEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The oral ruling (R. 80–81; Appendix A, *infra*, p. 12) of the district court dismissing the indictment has not been reported.

JURISDICTION

On February 18, 1960, the district court dismissed the indictment on the ground that it did not charge an offense under Section 302 of the Labor Management Relations Act of 1947 (R. 3, 7, 78–81; Appendices A, B, *infra*, pp. 12–13). A notice of appeal to this Court was filed in the district court on March 18, 1960 (R. 84–86). The jurisdiction of this Court to review on direct appeal the decision of the district court dismissing the indictment, on the ground that it did not charge a crime within the meaning of the

statute upon which it was founded, is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Section 302 of the Labor Management Relations Act of 1947 made it unlawful for an employer to "pay or deliver" to a representative of any of his employees in an industry affecting interstate commerce, or for such representative to "receive or accept" from the employer, "any money or other thing of value." The question presented is whether a loan of money comes within the foregoing prohibitions.

STATUTES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provided, in part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> * * * * * *

On September 14, 1959, Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, amended Section 302, *supra*, to read, in part, as follows:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *

* * * * *

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

* * * * *

STATEMENT

Section 302 (a) and (b) of the Labor Management Relations Act of 1947, *supra*, respectively, made it an offense for an employer to "pay or deliver" to a representative of his employees engaged in an industry affecting interstate commerce, and for such representative to "receive or accept" from the employer, "any money or other thing of value." A two-count indictment filed on June 17, 1959, in the United States District Court for the Southern District of New York charged five defendant employers[1] with having paid and delivered money in the amount of $200,000 to a representative of their employees (R. 1, 5; count 1), and charged the defendant represent-

[1] The employers were Roy Fruehauf, the Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., and the Brown Equipment and Manufacturing Co.

ative (Dave Beck) with having received the money (R. 1, 5–6; count 2), in violation of Section 302 (a) and (b), respectively. In a pre-trial memorandum, the government stated that it intended to prove that the defendant employers had loaned $200,000, unsecured and at an actual interest rate of about 2%, to the defendant representative through an intricate exchange of checks; and that the loan was subsequently repaid by the representative. (R. 13–19).

All the defendants orally moved to dismiss. After argument, the district court dismissed the indictment on the ground that Section 302, as it stood at the time of the offenses charged, did not cover loans of money. The court emphasized the fact that Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, *supra*, amended Section 302 of the 1947 Act to include specifically a prohibition upon loans (R. 78–80). The court stated (*ibid*; Appendix A, *infra*, p. 12):

> * * * Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not. I reject the argument that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that which I take it the Government urges was manifest before. I am, therefore, of the opinion that * * * the [loan] transaction was not

an offense contemplated by the statute as it existed at the time.

* * * * *

I am now granting the motion of all defendants to dismiss the indictment upon the ground that it fails to charge an offense of the statute as it read at the time the transaction occurred.

THE QUESTION IS SUBSTANTIAL

1. This appeal presents a substantial question of statutory construction under the Labor Management Relations Act of 1947 as originally enacted. The court below held that the broad prohibition of Section 302 of that Act, which barred an employer from paying or delivering to an employees' representative, or the latter from receiving or accepting, "*any* money or other thing of value" (emphasis added), does not cover a large unsecured loan by the employer to the representative. We submit, however, that both the language of Section 302 and its purpose, as reflected in its legislative history, indicate that the prohibition applies not only to outright gifts of money, but also to loans. See *infra*, pp. 7–11.

We recognize, of course, that loans made after September 14, 1959 (the effective date of the 1959 Act) are now specifically and unequivocally covered by Section 302. We do not believe, however, that this factor should militate against review. The instant case is an important criminal prosecution, involving a charge that a substantial sum of money was passed as a loan by a major industrial firm and its officers to a former leader of one of the largest unions in the country. The case has received considerable pub-

licity, and the government believes that the district court's dismissal of the indictment rests on an erroneous construction of the statute. In these circumstances, we urge that, whatever may be the effect of the decision below upon future cases (see *infra*), the proper administration of justice calls for review by this Court under its appellate jurisdiction of the district court's dismissal of this important indictment. Under the congressional scheme for review of criminal matters, there is no other tribunal in which review can be had.

Moreover, although the statute has now been amended specifically to cover loans, the holding below that it did not so apply as originally enacted may, if allowed to stand, have considerable future significance. The statute of limitations on loans that may have been made prior to September 14, 1959, will not run until September 13, 1964 (18 U.S.C. 3282). While we know of only one such pending case at present,[2] it is impossible to predict how many more cases may develop prior to the running of limitations. Finally, we note that the restrictive holding below is likely to have an adverse effect as a precedent in the interpretation of other important federal statutes containing similar language. See, *e.g.*, the various statutes dealing with gifts to, bribery of, and graft by federal officers and employees (18 U.S.C. 201–202, 204–216, 219–220; 26 U.S.C. 7214(a)(9)), false

[2] In *United States* v. *Golden, et al.*, Cr. No. 32479, N.D.N.Y., the indictment charged a violation of unamended Section 302 through the loan of a tug-boat. On December 24, 1959, the district court denied defendants' motion to dismiss the indictment, holding that such a loan was covered by the statute.

pretenses and false personation (18 U.S.C. 912, 915, 1025), blackmail (18 U.S.C. 873), and forms of extortion (18 U.S.C. 875(b), (d), 876, 877)—which use such terms as "money or other thing of value," "money, or * * * anything of value", and "valuable thing." It has been held that 18 U.S.C. 201, which prohibits the giving of "any money or thing of value" in an attempt to influence an officer or employee of or acting for the United States, covers a loan of money. *Malatkofski* v. *United States*, 179 F. 2d 905, 917 (C.A. 1).

2. In our view, the district court's narrow construction of Section 302 is erroneous. As enacted in 1947, the Act prohibited the "pay[ment] or deliver[y by an employer of] * * * money or other thing of value" to a representative of his employees, and the receipt or acceptance thereof by the representative. When an employer makes a loan to a representative, he "pay[s] or deliver[s] * * * money" to the representative, and the latter "receive[s] or accept[s]" the money from the employer. Thus, in terms, Section 302 covered loans as well as outright gifts.

Both the purpose of the Act and its legislative history confirm the view that Congress did not intend to create an exception to its "broad prohibition" (93 Cong. Rec. 4678) in favor of loans. One of the major purposes of Congress in the 1947 Act was "to prevent employers from tampering with the loyalty of union officials * * *." Judge Learned Hand, dissenting, in *United States* v. *Ryan*, 225 F. 2d 417, 426 (C.A. 2), reversed, 350 U.S. 299. By "outlaw[ing] all [unauthorized] payments * * * between employer and

representative" (*United States* v. *Ryan*, 350 U.S. 299, 305), Section 302 was designed to protect the integrity of the collective bargaining process by insuring that employers and representatives would deal at arms length. Congress thereby intended to avoid such obvious dangers to employee rights as bribery of the representative (92 Cong. Rec. 4893), extortion by the representative (93 Cong. Rec. 4679), and diversion of welfare funds by representatives to political or personal purposes (93 Cong. Rec. 4678; S. Rep. 105 (80th Cong., 1st Sess., p. 52).

A loan—particularly the loan of a large sum of money at a very low rate of interest—obviously can be just as effective a device for improperly influencing a union official as an unconditional gift. Congress struck at the mere possibility of abuse by prohibiting *all* unauthorized payments or receipts, without requiring a showing that the occurrence actually influenced the collective bargaining process. We submit that the broad language of Section 302 was intended to—and did—cover any payment or receipt that might cause such abuse, and that a loan is just as likely to do so as an outright gift.

3. We do not believe that the amendment of Section 302 by Section 505 of the Labor-Management Reporting and Disclosure Act of 1959 (*supra*, pp. 2–3), specifically to cover loans, justifies the inference drawn by the district court that if Congress thought that Section 302 as originally enacted included loans of money by employers to representatives, it would not have expressly added the words "lend" and "loan" in 1959. Rather, the legislative history of

the 1959 amendments indicates that Congress was there concerned with a totally different problem, and that the addition of the words "lend" and "loan" were merely intended to make explicit what was already implicit in the existing language.

The first proposal to add the words "lend" or "loan" to Section 302, *supra*, was contained in Section 607 of S. 3974, 85th Cong. 2d Sess., a bill which was passed by the Senate (104 Cong. Rec. 11487), but not by the House. Section 607 would have amended Section 302(a), *supra*, so as to make it "unlawful for any employer or any person who acts as a labor relations expert, adviser, or consultant to an employer to pay, lend, or deliver * * * any money or other thing of value" to a representative of the employer's employees. No comparable change was proposed in Section 302(b). The Senate Committee Report on the bill stated (S. Rep. 1684, 85th Cong. 2d Sess., pp. 43–44) that the purpose of Section 607 was "to forbid any payment or bribe by an employer or anyone acting on his behalf, whether technically an agent or not, and to forbid the receipt of any such bribe by any person, whether an individual, an officer, or employee of a labor organization, or a committee representing employees."[3] Thus, the purpose of the proposed amendment was to extend the prohibitions of Section 302 to "middlemen". There is nothing to indicate that, in adding the word "lend", the Senate believed it was expanding the statute to reach payments of a kind not previously covered.

[3] S. Rep. 1684 refers to Section 608, which became Section 607 in S. 3974 as passed by the Senate.

In the next Congress, Section 211 of S. 1555, 86th Cong., 1st Sess., proposed to amend Section 302(a) in substantially the same way as had Section 607 of S. 3974 in the preceding year. The Senate Report (No. 187, 86th Cong., 1st Sess. at p. 43) which accompanied the committee bill made no reference to the addition of the word "lend" and simply repeated, in almost verbatim language, the explanation contained in S. Rep. 1684 (85th Cong. 2d Sess.), *supra*.[4] The House Committee on Education and Labor, to which S. 1555 was referred, used the Senate bill as "the basis of [its] work" in preparing its bill (H.R. 8342, 86th Cong., 1st Sess.), and it accepted all of the Senate's proposed amendments to Section 302. It added associations of employers to the group forbidden to make payments, and changed Section 302(b) of the 1947 Act to reflect the language of Section 302(a). H.R. 8342 (86th Cong., 1st Sess.) Section 505; H. Rep. 741 (86th Cong., 1st Sess.) p. 77. The House Committee stated (H. Rep. 741, *supra*, p. 46) that "The purpose of these amendments to Section 302 is to forbid any payment, loan, or bribe by an employer, employer association, or anyone acting on an employer's behalf, *i.e.*, labor relations consultant. The demand or acceptance of such payment, loan, or bribe is also proscribed." The bill became law in that form. 73 Stat. 537.

While there is some material in the legislative history of the 1959 Act that points in the other direction,

[4] The committee reference is actually to Section 111, which became Section 211 of the Senate bill upon passage. 105 Cong. Rec. 6745.

we do not believe that, viewed in its entirety, the history indicates that the specification of "loans" as within the categories of payments prohibited by Section 302 was intended to broaden the previously existing prohibitions. On the contrary, both the language of Section 302 as originally enacted, and its purpose of protecting the integrity of the collective bargaining process, show that it covered loans as well as outright gifts.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this Court should note probable jurisdiction of this appeal.

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MAY 1960.

APPENDIX A

The district court made the following pertinent remarks and entered the following oral order at the close of the hearing on the motions to dismiss (R. 78–81):

> We now come to the next step. Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not. I reject the argument that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that which I take it the Government urges was manifest here. I am, therefore, of the opinion that on the extrinsic evidence offered to be introduced by the Government and its judicial admission the transaction was not an offense contemplated by the statute as it existed at the time.
>
> * * * * *
>
> I am now granting the motion of all defendants to dismiss the indictment upon the ground that it fails to charge an offense of the statute as it read at the time the transaction occurred.
>
> In the light of that ruling I see no necessity to rule upon the remaining questions raised, to wit: variance, the effect of the statute of limitations, the question of venue, and the charge of vagueness of the statute.
>
> The indictment accordingly, and for the reasons ascribed is dismissed.

APPENDIX B

United States District Court, Southern District of New York

United States of America v. *Roy Fruehauf, Fruehauf Trailer Co., et al,* Defendants. Cr. 159–138.

Feb. 18, 1960. Case called before Sugarman J., Hearing begun.

Deft Fruehauf motions to dismiss—Granted.

Deft Fruehauf Trailer Co. motions to dismiss—Granted.

Deft Burge Seymour motions to dismiss—Granted.

Deft Associated Transport Inc. motions to dismiss—Granted.

Deft Brown Equipment & Mfg. Co. motions to dismiss—Granted.

Deft Beck's motions to dismiss—Granted.

Bail cont'd as to Both Defendants.

SUGARMAN, J.

(18)

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IN THE

Supreme Court of the United States

October Term, 1959

No. 944 91

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1959

No. 941.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—v.—

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellees, Roy Fruehauf, Burge Seymour, Associated Transport, Inc. and Brown Equipment & Manufacturing Co., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Opinion Below

The ruling of the District Court (R. 80-81; Appendix A of Jurisdictional Statement), which dismissed the indictment herein, has not been reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

Question Presented

Section 302 of the Labor Management Relations Act of 1947 made it unlawful for an employer to "pay or deliver" to a representative of any of his employees in an industry affecting interstate commerce, or for such representative to "receive or accept" from the employer, "any money or other thing of value." The question presented is whether a loan of money, evidenced by a promissory note and repaid with interest, comes within the foregoing prohibitions.

Statutes Involved

The pertinent provisions of Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U. S. C. A. 186, and Section 505 of the Labor Management Report and Disclosure Act of 1959, 73 Stat. 537, which amended said Section 302, are set forth in the Jurisdictional Statement at pages 2-3.

Statement of the Case

This is an appeal from the dismissal of an indictment under Section 302 of the Labor Management Relations Act of 1947 as it stood prior to amendment in September 1959.

The two-count indictment, filed on June 17, 1959 in the United States District Court for the Southern District of New York, charged that on or about June 21, 1954, defendants Fruehauf, Fruehauf Trailer Co., Seymour, Associated Transport, Inc. and Brown Equipment & Manufacturing Co., in violation of Section 302(a) of the Act, did "pay and

deliver and agreed to pay and deliver to Dave Beck * * * a thing of value, to wit, money in the amount of $200,000" (R. 1, 5; Count 1) and that defendant Beck did "receive and accept" the money in violation of Section 302(b) of the Act (R. 1, 5-6; Count 2).

Subsequently, appellant admitted that the transaction involved was a loan, and that the loan was repaid in full, with interest (R. 13-14).

On February 18, 1960, all the defendants orally moved to dismiss the complaint. After argument, the District Court (Sugarman, J.) dismissed the indictment on the ground that Section 302, as it existed at the time of the offenses charged, did not proscribe loans of money (R. 80-81; Appendix A of Jurisdictional Statement).

Since, as the Jurisdictional Statement (p. 6) sets forth, "the statute has now been amended specifically to cover loans," the question here involved cannot possibly arise in any future transaction. The appellant concedes that there is only "one such pending case at present," and its reference to the "considerable publicity" allegedly given to the instant case (pp. 5-6) is irrelevant. Nor would the interpretation of the bribery statutes cited by the appellant (pp. 6-7) be in any way affected hereby, in view of (1) the substantial differences in their language, and (2) their requirement of a specific corrupt intent (except for 18 U. S. C. A. 211, which is explicitly limited to a "present").

In the interest of clarity, we have separated into two Points (although they lead to one conclusion) our arguments that (1) the statute, as it existed at the time of the transaction in question, did not prohibit a loan, and (2) the subsequent amendment thereto, adding the word "lend," clearly confirmed Congress' understanding that a loan had not previously been prohibited.

POINT I

The District Court's construction of Section 302(a) as excluding loans falls squarely within the principle that where a statute, creating a new crime merely *malum prohibitum*, "admits of a double meaning," "all reasonable doubts must operate in favor of the accused," who was entitled to "an unequivocal warning" of the Acts rendered criminal.

The words "pay or deliver any money or other thing of value" do not fairly connote the making of a loan. First, Webster's New International Dictionary (in substantially the same laguage as Funk & Wagnall and all of the other dictionaries) defines "pay" as:

> "2. To satisfy (one) for service rendered, property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; * * * 3. To give in return for services, purchases, etc., in satisfaction of a promise, a moral debt, * * * or in retribution (that which is due) * * * 4. To make compensation or retaliation for * * *; to make up for * * *; to recompense * * * 5. To give, offer or make, freely or as fitting * * *."

It defines "deliver" as (*inter alia*) "To give or transfer; to yield possession or control of; to part with; to make or hand over." The synonym given for "deliver" is "release," and none of the many synonyms given for "pay" in any dictionary includes "lend."

It is universally recognized that "the word 'pay' indicates the discharge of an obligation rather than an investment of money." (*Hopson* v. *The Aetna Axle & Spring Co.*, 50 Conn. 597, 601). A loan, like an investment, is "made," not "paid."

Certainly it should not be presumed that Congress used these simple words inaccurately or ambiguously. As this

Court held in *Bell* v. *United States*, 349 U. S. 81, 83 (1955, Frankfurter, J.):

> "About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit."

The only decision prior to the instant one involving—although in a different context—the question whether a loan was a "payment" within the meaning of Section 302(c), is *United Garment Workers of America* v. *Jacob Reed's Sons*, 83 F. Supp. 49, 52 (E. D. Pa., 1949), which held:

> "Loans from trust funds to members would not be payments to members. The term 'payment' used in this section does not mean a loan. It is rather a settlement of a lawful claim which the member has against the fund * * *. Such payments are to be distinguished from loans. * * *"

The mere assertion that money loaned is a "thing of value" is irrelevant; the point is that the verbs "pay" and "deliver" did not include "lend." (*Semble*, *Western Union* v. *Lenroot*, 323 U. S. 490, 505-6, 1945).

Any doubt is resolved by the canons of construction applicable to criminal statutes. It is elementary that: "'In the construction of a penal statute, all reasonable doubts concerning its meaning ought to operate in favor of the accused. Harrison v. Vose, 9 How. 372, 50 U. S. 372, 378'" (*North American Van Lines* v. *United States*, 243 F. 2d 693, 696, C. A. 6, 1957, citing, *inter alia*, *United States* v. *Resnick*, 299 U. S. 207 and *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284).

McBoyle v. *United States*, 283 U. S. 25 (1931, Holmes, J.) held that an airplane was not a "motor vehicle * * * or

any other self-propelled vehicle not designed for running on rails," within the meaning of a statute penalizing the transportation of stolen vehicles. In unanimously reversing a judgment of conviction, the Court indicated that even in the case of "a criminal [who is not likely carefully to] consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given * * * in language that the common world will understand" (p. 27). It further decided that "the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies" (*ibid.*). How much more strongly do these principles apply to the appellant's attempt to extend what it surmises (p. 7) to have been "the purpose of the Act" to these defendants, who would certainly not have made the loan if they had been fairly notified, or had even suspected, that such conduct was criminal.

Prior to the enactment of Section 302(a), it was not a crime for an employer to pay or deliver any money or other thing of value to a representative of his employees, and the crime which it created was solely *malum prohibitum* (*United States* v. *Ryan*, 350 U. S. 299, 305; *Brennan* v. United States, 240 F. 2d 253 [C. A. 8, 1957], cert. den. 353 U. S. 931 [1957]; *Korholz* v. *United States*, 269 F. 2d 897 [C. A. 10, 1959], cert. den. 366 U. S. 929 [1960]). Consequently, that statute will be construed in accordance with the requirement that it give the employer a clear and unequivocal warning, in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

As this Court succinctly held in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 393 (1926):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. • • •

"'The dividing line between what is lawful and unlawful can not be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. • • • Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning' • • •"

Even if Section 302(a) does not, as we contend, clearly exclude loans, unquestionably it does, at best, "admit of a double meaning," in which "the dividing line between what is lawful and unlawful" is not clear. Certainly:

> "It is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." (*United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222—1952)

Among the numerous other authorities to the same effect are: *United States* v. *McNinch*, 356 U. S. 595; *Iselin* v. *United States*, 270 U. S. 245; *Bell* v. *United States*, 349 U. S. 81 (*supra*); *Hall*, "*Strict or Liberal Construction of Penal Statutes*," 48 Harv. L. Rev. 748, 765-6, and cases cited.

Had Congress intended to proscribe loans, it could easily, and should, have expressly done so—as it did twelve years later. Thus, when it defined the terms "contribution" and "expenditure," within the restrictive sections of Chapter 29 of Title 18 pertaining to "Elections and Political Activities," Congress was not content with the words "gift" and "payment," but expressly included the word "loan" in both definitions (18 U. S. C. A., Sec.

591). Significantly, both definitions also contained, as the object of those verbs, the phrase—virtually identical with that in the instant statute—"money, or anything of value" (*ibid.*).

Similarly, when Congress, in the Federal Corrupt Practices Act (Title 2, Ch. 8), prohibited certain election contributions by national banks and other federal corporations, it expressly defined the term "contribution" to include a "loan," as well as a "gift." Here again, Congress used the same phrase "money, or anything of value" (Sec. 241, subdivisions d and e).

When Congress proscribed a loan by a bank employee to a bank examiner, it did not use the verbs "pay" or "deliver" to preface the word "loan," but instead wrote "makes or grants any loan" (18 U. S. C. A., Sec. 217). The crime defined in that statute was, like the instant one, *malum prohibitum* and, when Congress enacted it in 1948, it expressly included the word "loan." This renders all the more significant Congress' omission of that word from Section 302 in 1947 and its failure to add it until 1959.

The appellant's invocation of what it describes as "the broad [actually, vague] language of Section 302" (p. 8) flies in the teeth of the decisions above cited, in all of which the language was no less "broad" and the Government also contended that the underlying policy of Congress was in jeopardy. As this Court held in *United States* v. *Cardiff*, 344 U. S. 174 (1952, Douglas, J.):

> "The department of Justice urges * * * that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized." (p. 175)
>
> * * *
>
> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited.

> Words which are vague and fluid (cf. United States v. L. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula." (p. 176)

Malatkofski v. *United States*, 179 F. 2d 905 (Jurisdictional Statement, p. 7) is inapplicable here on at least five grounds: (1) the defendant "conceded that under the statute the crime of bribery" had been established (p. 917), so that no question of statutory interpretation was in any way involved; (2) the verbs used in the statute there were broader than the instant ones (p. 908); (3) the crime defined by the statute in that case was not *malum prohibitum* but *malum in se* and required specific intent, so that the doctrine of fair warning was not controlling (*United States* v. *Dennis*, 183 F. 2d 201, 215, aff'd 341 U. S. 494); (4) the Court expressly held that, because of the illegality demonstrated, the transaction was not an enforceable "loan" at all (p. 919); and (5) the jury evidently "found that the money was paid over without any expectation of return" (*ibid.*).

This Court's language in *United States* v. *Ryan*, 350 U. S. 299, is quoted out of context (Jurisdictional Statement, pp. 7-8). The Court merely decided that "the president and principal negotiator of a labor union [who had received several outright and egregious gifts from the employer was] a 'representative' of employees within the meaning of § 302(b)" (p. 300). It held that its interpretation of those words was supported by "their literal meaning" (p. 302), as well as the "legislative history," and furthermore, that a contrary interpretation would "reduce the legislation to a practical nullity" (p. 306). None of these considerations applies here.

Appellant's characterizations (p. 8) of the Congressional debates which preceded the enactment of the original Section 302(a) are misleading. Those debates pertained to

the regulation of employer contributions to union welfare funds—which purpose, as Judge Hand acknowledged in the *Ryan* case (225 F. 2d at p. 426), was "particularly present in the mind of Congress at the time." There is not, and has not been, the slightest intimation that loans were "in the mind of Congress" or, *a fortiori*, in its statutory expression.

It might also be observed that, subsequently to this Court's decision in *United States* v. *Ryan, supra,* Section 302(a) was given a restrictive interpretation in *Arroyo* v. *United States,* 359 U. S. 419 (1959) and *Ventimiglia* v. *United States,* 242 F. 2d 620 (C. A. 4, 1957).

In *United States* v. *Golden,* Cr. No. 32479, N. D. N. Y. (Jurisdictional Statement, p. 6, ftn.), the court actually acknowledged in its memorandum-decision (next to last paragraph) "that the word 'loan' does not mean 'to pay' as those words appear in the statute." It held that the gratuitous delivery of the tugboats was, under the particular facts there, merely "a device to circumvent the statute" —*i.e.,* a cloaked gift (see Brief of the United States, p. 5).

POINT II

The 1959 amendment of Section 302(a), by expressly adding the word "lend" to the Acts proscribed, evidences Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan.

The history of this amendment clearly indicates that the word "lend" was intended to close a "loophole."

While it is clear from the foregoing discussion that Section 302, as it stood at the time of the offenses charged, did not cover loans, any doubt which might have existed

has been laid to rest by the 1959 amendment of this section, which added, *inter alia*, the word "lend" to the prohibited acts.

The Act, as amended, reads in pertinent part as follows:

> "Section 302(a). It shall be unlawful for any employer or any person who acts as a labor relations expert, adviser or consultant to an employer to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value * * *." (emphasis supplied)

The Congressional proceedings which preceded and accompanied the amendment of Section 302 in 1959 establish that Congress recognized that the 1947 Act did not cover loans, and that the prohibition thereof was one of the express purposes of the amendment.

Indeed, the actual author of the amendment, Senator Kennedy, stated at the 1957 hearings of the McClellan Committee (Senate Select Committee on Improper Activities in the Labor or Management Field), which resulted in the amendment, that the very acts for which these defendants have been indicted were not a violation of existing law. Senator Kennedy said, after summarizing the very transaction here involved:

> "While there is no law against it, I think the committee should take cognizance of the attitude that they took before this committee and recognize that they have a responsibility as well as rights in this matter." (Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., 2nd Sess., 2402)

In the course of the Congressional hearings on the amendment, the statements of various legislators and experts made it clear that the amendment added a prohibition against loans to the statute and thus closed what was referred to as an existing "loophole."

Senator Goldwater, a member of both the McClellan Committee and the Senate Labor and Public Welfare Committee, stated in testimony before the Joint Sub-Committee of the House Education and Labor Committee:

> "The Taft-Hartley Act prohibits certain types of payments by employers to labor unions or their agents as tending to corrupt or wrongfully influence them. Following this lead, the bill *adds* a prohibition on any loans as well." (4 Hearings before a Joint Sub-Committee of the Committee on Education and Labor, 86th Cong., 1st Sess., on H. R. 3450, 1604, 1627; emphasis supplied)

The President of the A.F. of L.-C.I.O., George Meany, maintained the identical view before the House Labor Committee. He stated:

> "Both of these bills contain, in Section 107, provisions restricting loans from unions to their officers or employees, and barring loans from employers to officers or employees of unions representing the particular employer's employees. These provisions seem to us sound and desirable." (1 Hearings 103)

The prepared statement of the United States Chamber of Commerce, read at the Senate hearings on the Kennedy bill, characterized the proposed amendment in the following language:

> "There are some provisions in section 112 that the chamber favors. Among them are the provisions closing present loopholes in section 302(a) by expanding the prohibitions of this subsection to labor relations consultants or to indirect bribes to labor officials or organizations in the form of loans." (Hearings before the Senate Subcommittee on Labor on S. 505, etc., 86th Con., 1st Sess., 230; see also Statement of Joseph Beirne, President, Communications Workers of America, AFL-CIO, *id.* at 802)

During the course of the debates on the bill on the floor of the Senate, Senator Goldwater stated:

> "Section 211 amends numerous provisions of Section 302 of the Taft-Hartley Act, which was originally designed to outlaw certain types of payments made by employers to labor unions or their agents, payments which are generally suspect as attempts to corrupt or wrongfully influence union leaders.
>
> "Section 302 as it presently reads, prohibits any such payment or delivery of money or other thing of value. *This section adds a prohibition on any loan as well.*" (105 Cong. Rec. 9112; emphasis supplied)

The reports on the amendatory legislation of both the House and Senate Labor Committees are in accord that a purpose of the amended legislation was to close the existing loophole. The Senate Report states:

> "Although these provisions of existing law would punish most forms of bribery or extortion if they were vigorously enforced by prosecuting officers the testimony before the McClellan Committee revealed loopholes which both employer representatives and union officials turned to advantage at the expense of employees. The Committee bill proposes to close the *loophole*. The provisions dealing with management abuses are discussed below." (Sen. Rep. No. 187, 86th Cong., 1st Sess., p. 13; emphasis supplied)

The House Report (No. 741, 86th Cong., 1st Sess.) contains at page 43 the following description of the proposed amendment:

> "Under existing law it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c) of Section 302. The purpose of these amendments to Section 302 is to forbid any payment, loan, or bribe by an employer, employer association, or anyone acting on an employer's behalf, i. e., labor relations consultant. The demand or acceptance of such payment, loan, or bribe is also proscribed."

The view that the addition of the words "lend" and "loan" to Section 302 substantively changed the statute so as to add a proscription where none existed before has been succinctly expressed in *Aaron, The Labor Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 851, 892 (1960)

> "It adds loans and agreements to lend to the types of payments already prohibited. It also adds the following to the list of recipients who may not receive such payments or loans * * *"

Mr. Aaron further observes, at pages 892-3:

> "The amended law will outlaw bona fide loans, openly made, by some employers to their employees. This is unfortunate, but scarcely a weighty argument against commendable objectives of the amendment."

Thus, it is evident from the Congressional proceedings that Congress did not believe that Section 302 covered loans and felt it necessary to amend the statute to close the loophole.

Precisely applicable, therefore, is the recent decision of *Fischer Flouring Mills Co.* v. *United States,* 270 F. 2d 27 (C. A. 9, 1959), holding:

> "It is hornbook law that, where Congress has amended a statute to cover a 'loophole' the fact that an addition has been required is proof that the prior statute should be given a different construction."

In Point 3, of the Jurisdictional Statement (pp. 8 through 11), appellant contends that the purpose of the amendment of Section 302 was to extend its prohibitions to "middlemen," and that the addition of the words "lend" and "loan" was merely intended to clarify what was already implicit in the existing language of the statute. Not only is this refuted by the legislative history of the amend-

ment, as above set forth, but also by the plain language of the amendment itself.

The Labor Management Reporting and Disclosure Act of 1959, the comprehensive statute which contains the amendment to Section 302 as Section 505 thereof, opens with a "Declaration of Findings, Purposes and Policy." Subdivision (b) of Section 2 of that Declaration reads:

> "(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require *further and supplementary legislation* that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives." (Emphasis supplied.)

Thus Congress itself, in the very statute here involved, described the amendment as imposing further and supplementary prohibitions, applicable to "employers" as well as "middlemen".

While quoting from the Senate Committee Report of the Eighty-Fifth Congress, the appellant (p. 9) completely omits all mention of the far clearer Senate Report of the Eighty-Sixth Congress, which actually enacted the amendment (*supra*). Moreover, nothing even in the earlier Report indicates in any way that the added word "lend" is any less novel than the added phrase "labor relations expert, adviser or consultant to an employer," which the appellant concedes was a substantive addition.

Indeed, the latter phrase could more readily be construed as within the meaning of the term "employer" than can "lend" be construed as "pay or deliver." This is particularly true since the word "employer" has been held

to include "any person acting as an agent of an employer, directly or indirectly" (*United States* v. *Lavery*, 161 F. Supp. 283, 286, W. D. Pa., 1958; *United States* v. *Ryan*, 128 F. Supp. 128, 131, S. D. N. Y., 1955).

Even the most casual comparison of the original Section 302(a) with the amendment shows that the latter, far from being a clarification, represented a most substantial enlargement and innovation. Thus, the title of the original section was merely "Restrictions on payments to employee representatives * * *." In contrast, the title of the amended Section 302 is "Restrictions on payments *and loans* to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees * * *" (emphasis supplied).

Congress recognized that a loan, like a payment to a union agent who is technically not a "representative," was outside the proscription of Section 302(a) and brought it within the ambit of the statute by the 1959 amendment. The fact that loans were not added to that section for twelve years, during which Congress was continually in session, is in itself persuasive evidence that the addition was not a mere clarification.

This Court has consistently held that where a statute, and particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the new specification was not theretofore unlawful.

In *United States* v. *Chase*, 135 U. S. 255, the defendant had been indicted for mailing an indecent letter under a statute which proscribed the mailing of a "book, pamphlet, picture, paper, writing, print or other publication of an indecent character." After the indictment was filed, the statute was amended to add "letters" to the list of pro-

hibited matter. The United States contended that the term "writing" included letters. The Supreme Court, in ruling that the statute had not been violated, stated:

> "If letters were embraced in the Statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that body did not put the construction on the prior Statute claimed in behalf of the United States, else we have it doing a useless and vain act." (p. 262)

Similarly, in *Viereck* v. *United States,* 318 U. S. 236, a statute requiring the disclosure of propagandists' activities for foreign governments was amended after the acts for which defendant was indicted had occurred, so as to proscribe the type of acts for which Viereck was indicted. The Court stated at page 247:

> "While we find in the Committee reports no mention of the explicit restriction of the application of § 3(c) of the old Act to the registrant's activities 'as Agent', the reports reveal a clear purpose to make the registration requirements of the new Act extend to all his activities. We think that in this respect the new Act extends beyond the old and that the application, *ex post facto,* of the new, to impose on petitioner a duty which the words of the old plainly exclude, is not to be justified by denominating the amendment as clarifying or declaratory legislation."

Among the many other decisions to the same effect, see *United States* v. *Curtis,* 107 U. S. 671 (1883).

CONCLUSION

It is respectfully submitted that appellant has presented no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 91

UNITED STATES OF AMERICA,

Appellant,

against

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*, —*against*— ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., and DAVE BECK, *Appellees*.	No. 941

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee Fruehauf Trailer Co., pursuant to Rule 16 of the Revised Rules of this Court, moves that the final judgment of the District Court be affirmed on the ground that it is manifest that the question on which the decision of this cause depends is so unsubstantial as not to need further argument.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

The question presented is whether a loan of money in 1954 by an employer, in an industry affecting commerce, to a representative of his employees, intending repayment of said money with interest, falls within the proscription of Section 302(a), (b) of the Labor Management Relations Act of 1947.[1]

STATUTES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U. S. C. § 186, provided, in part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> * * *
>
> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment of not more than one year, or both.
>
> * * * * *

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[1]This statement of the question differs from the statement of the question posed in the Notice of Appeal in two respects, namely: (1) the Notice uses the term "payment of money" instead of "loan of money"; and, (2) this statement adds the year of the transaction (i.e., "in 1954").

On September 14, 1959, Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, amended Section 302, *supra*, to read, in part, as follows:

(a) It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *.

(b)(1) It shall be unlawful for any *person* to *request, demand*, receive, or accept, or agree to receive or accept, any payment, *loan*, or delivery of any money or other thing of value *prohibited by subsection (a)*.[2]

* * * * *

STATEMENT

This is a direct appeal from the final judgment entered on February 18, 1960 by the United States District Court for the Southern District of New York dismissing the indictment[3] as against all the defendants. The indictment was returned on June 17, 1959.

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[2]Italics indicate new material.

[3]Count I of the indictment reads as follows:

"On or about the 21st day of June, 1954, in the Southern District of New York, ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. and BROWN EQUIPMENT AND MANUFACTURING CO., defendants, employers of employees who were engaged in an industry affecting commerce, did unlawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to DAVE BECK, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

Count I of said indictment charged that in June 1954, the employer-defendants paid and delivered to a representative of their employees (Dave Beck) a thing of value, to wit, money in the amount of $200,000, in violation of Section 302(a), (d). Count II charged the defendant-representative (Dave Beck) with having received the money in violation of Section 302(b), (d).

On February 18, 1960, the case came on for trial before the Honorable Sidney Sugarman, United States District Judge. Prior to empaneling a jury the District Court read into the record extracts from the government's pre-trial memorandum, and ruled that said extracts constituted judicial admission of fact (R 6 et seq.). Thereafter, on oral motion of defendants, the indictment was dismissed as to all defendants.

The government charged that in 1954 defendant-employers paid or delivered money to the defendant-representative. Despite this charge, the government's pre-trial memorandum, submitted to the District Court, acknowledged that the transaction was a loan at interest, and that the loan had been repaid in 1955 by the defendant-representative. The District Court ruled that, since the transaction was a loan, it was not encompassed or proscribed by Section 302(a), (b). The defendants' motions to dismiss were thereupon granted. Direct appeal was taken to this Court by the government pursuant to 18 U. S. C. § 3731.

ARGUMENT

The question presented is so unsubstantial that the judgment below should be affirmed without full hearing.

Appellee urges summary affirmance for two reasons. First, prerequisite to full consideration by this Court, a question must have "substance"—meaning importance to

the public, and not merely importance to the parties alone. Five years after the transaction alleged in the indictment, Section 302 was amended to prohibit loans in express terms. The construction of the old statute now has no public importance and no "substance".

Second, the 1947 version of the statute (Section 302) did not expressly prohibit loans; and in the absence of express language, there was no prohibition of loans. Section 302 is *malum prohibitum*: a *malum prohibitum* statute must clearly prohibit an act in order to make that act illegal. At the very least, Section 302 did not state that loans were prohibited in terms which gave fair warning to the community. Moreover, the legislative history of the 1947 version of Section 302, like the language of the statute, shows no intention by Congress to prohibit loans.

1. The construction of Section 302, as originally enacted in 1947, has no public significance, and this appeal should not be permitted to take up the time of this Court.

This Court has repeatedly emphasized to the Bar that it carries a tremendous work-load and can afford to devote its time to full-dress hearings of only those cases which have importance to the entire community and not merely importance to the particular parties alone.[4] Rule 16(1)(c) of this Court contemplates a summary disposition of "unsubstantial" questions, notwithstanding a statutory right of appeal, where the question presented is simply not worthy of full-dress argument at the expense of other applications for full review.[5] In this respect, the considerations governing motions to dismiss or affirm under Rule 16 are effectually the same as the considerations governing review on

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[4]See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897 (1955).

[5]See Del Pozo y Marcos v. Wilson Cypress Co., 269 U. S. 82, 46 S. Ct. 57, 70 L. ed. 172 (1925).

certiorari under Rule 19.[6] The threshold issue should be, Does the question presented have "substance"? That is, are there special and important reasons, in the exercise of sound judicial discretion, for the Court to place the matter on its calendar?

The only possible importance of this appeal is in regard to loans made by "employers" to "representatives" prior to September 14, 1959, yet within the five-year statute of limitations (18 U. S. C. § 3282). The rarity of those loan transactions can be seen from the fact that the case at bar and one other case[7] are the only two pending cases "known" to the government (Jurisdictional Statement, p. 6). Diligent search has disclosed no other criminal cases, reported or unreported, involving loans under Section 302, despite the fact that thirteen years have elapsed since its enactment in 1947. It seems reasonable to predict that few, if any, additional cases involving loans will "develop" under the 1947 version of Section 302.

Literally hundreds of appeals and petitions for certiorari are presented to this Court annually. The construction of a statutory provision already declared by Congress to be inadequate,[8] and already amended by Congress to remedy the inadequacy, surely has no claim to the work-load of this Court.

2. Section 302, as originally enacted in 1947, failed to give fair notice to the community that a genuine loan was proscribed.

The Courts have ruled that Section 302 is *malum prohibitum* and not *malum in se*, and that criminal intent is im-

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[6]See STERN & GRESSMAN, *Supreme Court Practice* (2d Ed., BNA, 1954), pp. 237, 250-253.

[7]United States v. Golden, Cr. No. 32479, U. S. D. C., N. D. N. Y., decided Dec. 24, 1959, per Brennan, J. (See Jurisdictional Statement, p. 6, fn. 2.)

[8]See discussion *infra*.

material.[9] It is ancient law that criminal statutes and especially provisions *malum prohibitum*, are to be strictly construed in favor of the defendants indicted thereunder. Statutory prohibition of conduct must be clear and unambiguous; otherwise, the conduct is not criminal, and an indictment under an unclear and ambiguous statute with respect to such conduct must be dismissed. In construing such a criminal statute, the Court must inquire whether that statute gives fair warning to the community of what the legislature intends to prohibit and penalize, and whether that warning is expressed in language that the average citizen in the community can reasonably understand. The warning must be explicit in the statute and not concealed in the mind of the draftsman. As stated by Mr. Justice Holmes in McBoyle v. United States, 283 U. S. 25, 51 S. Ct. 340, 75 L. ed. 816 (1930):

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a *fair warning* should be given to the world *in language that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. [Case.]" 283 U. S. at 27 (emphasis supplied).

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[9] United States v. Ryan, 232 F. 2d 481 (2d Cir. 1956), on remand from 350 U. S. 299, 76 S. Ct. 400, 100 L. ed. 335 (1955); Brennan v. United States, 240 F. 2d 253 (8th Cir. 1956), cert. den. 353 U. S. 931, 77 S. Ct. 716, 1 L. ed. 2d 724 (1957); Korholz v. United States, 269 F. 2d 897 (10th Cir. 1959), cert. den. 361 U. S. 929, 80 S. Ct. 367, 4 L. ed. 2d 352 (1960)

This Court has had occasion recently to explain and emphasize the policy underlying the requirement that *malum prohibitum* statutes be strictly construed in favor of defendants. Ordinarily, our system of law requires that crimes involve the element of *mens rea* or criminal intent.[10] Nevertheless, Congress may omit *mens rea* from crimes created to enforce federal regulations, such as the regulations of interstate commerce under Section 302. No matter how multifarious those regulatory crimes may be: so long as they omit the element of criminal intent, they are exceptional. If criminal penalties are to be imposed without any element of criminal intent, then the statutes must at least prohibit the newly punishable conduct in absolutely clear terms. As stated by Mr. Justice Jackson, in Morissette v. United States:[11]

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. * * *" 342 U. S. at 250.
>
> "* * * Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. * * *" 342 U. S. at 256.
>
> "The Government asks us by a feat of construction radically to change the weights and balances in

[10]See Smith v. California, U. S. , 80 S. Ct. , 4 L. ed. 2d 205 (1959); Lambert v. California, 355 U. S. 225, 78 S. Ct. 240, 2 L. ed. 2d 228 (1957); Morissette v. United States, 342 U. S. 246, 72 S. Ct. 240, 96 L. ed. 288 (1952).

[11]Note 10, *supra*.

> the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative." 342 U. S. at 263.

There is no element of *mens rea* in Section 302. Yet the 1947 version of Section 302 contained no language giving fair warning to the defendants that a loan was to be a crime in 1954. Our system of law simply will not tolerate a criminal conviction for a genuine loan under the old Section 302.

3. When Congress has prohibited loan transactions in *malum prohibitum* statutes, Congress has done so explicitly. The absence of such explicit prohibition in Section 302 is manifest upon comparison with 18 U. S. C. §§ 217 and 218. The District Court's interpretation of Section 302 can have no adverse effect upon Chapter 11 (Bribery and Graft) of the federal Criminal Code. Most of those sections are ***malum in se***. By contrast, Section 302 and Sections 217 and 218 are *malum prohibitum*.

In an attempt to establish the "substance" of this appeal, the government warns that the District Court's interpretation of Section 302 may affect the meaning of the federal bribery statutes. The government notes a similarity of language in Section 302 and in 18 U. S. C. §§ 201, 202, 204-216, 219, 220.[12] At most, the similarity is superficial.

[12] Jurisdictional Statement, pp. 6-7. The other statutes cited by the government and claimed to contain language similar to § 302 (Jurisdictional Statement, pp. 6-7) include 18 U. S. C. §§ 912, 915, 1025 (false pretenses, false personation); 18 U. S. C. § 873 (blackmail);

It is significant that the government deliberately omits reference to 18 U. S. C. §§ 217, 218. Even a cursory comparison of the language of these statutes compels the conclusion that Congress did not intend to include a genuine loan in Section 302. That is precisely the reason for the dismissal of the indictment by the Court below.

The bribery statutes cited by the government deal with gifts, bribes and graft to federal officers and employees, and they omit the word "loan". However, each of those statutes contains a statement to the effect that the offer, promise or gift of any money or other thing of value must be made *with intent to influence the decision or action of the recipient on a question* before him in his official capacity. Significantly, the only two sections in the series from 18 U. S. C. § 201 through § 220 using the word "loan" and penalizing such a transaction, are Sections 217 and 218. The latter sections refer to transactions with bank examiners, and provide that any bank officer who grants any *loan or* gratuity to a bank examiner, commits a crime. Sections 217 and 218 contain no language similar to "with intent to influence his decision or action on any question".

The broad language of Sections 201 and 202 and the other sections of the Bribery Chapter of the Criminal Code cited by the government, focus on "intent to influence". It is immaterial to the question presented whether the language of those bribery statutes would support an indictment and conviction for an illegitimate loan transaction; for *no* transaction would be criminal, as bribery, unless the parties had engaged in that transaction with specific criminal intent. On the other hand, and by sharp contrast, where Congress has intended to prohibit loans without regard to "intent to influence", Congress has done so—and said so—in precise

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18 U. S. C. §§ 875(b), (d), 876, 877 (extortion). It is inconceivable that a loan transaction could even be regarded as an element of any of those crimes.

terms, as in Sections 217 and 218, and in the 1959 version of Section 302.

The legislative histories of both Section 302 and the Bribery Chapter of the Criminal Code, clearly demonstrate the foregoing.

First of all, the entire Criminal Code was in process of re-definition and re-codification by the 79th Congress—the same Congress which enacted the Taft-Hartley Act—during the session when Section 302 was enacted. The word "loan" was included in the 1948 version of Sections 217 and 218; yet, the word "loan" was omitted from the 1947 version of Section 302.

Secondly, in 1959, when Congress did undertake to amplify and re-codify the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), the resulting statute—the Labor Management Reporting and Disclosure Act of 1959 ("Landrum-Griffin Act")—expressly prohibited loans in addition to outright payments. Section 302 *now* reads:

> "(a) It shall be unlawful for any employer * * * to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value—* * *." (Emphasis supplied.)

What is of critical importance here, is that Sections 201 and 202, and the other sections of Chapter 11 cited by the government, are true bribery statutes; that is, they are *malum in se* statutes which characteristically make the crux of the crime the influence on the recipient in his official capacity. Accordingly, the prosecution must prove intent by the defendants to accomplish undue influence. On the other hand, Sections 217 and 218—and the 1959 version of Section 302—prohibit a transaction between certain parties, irrespective of intent to influence or any other criminal intent.

4. The legislative history of Section 302, as originally enacted in 1947, makes clear that Congress had no intention to prohibit genuine loans by employers to union officers.

Exhaustive research by Appellee has revealed absolutely nothing in the legislative history of Section 302 to indicate any recognition whatever by Congress in 1947 that loans in the labor-management field required regulation. The most conclusive documentation of the foregoing statement is the absence of any citation to the contrary in the Jurisdictional Statement.

In 1959, Congress did turn its attention to loans in the labor-management field. As noted above, Section 302 was amended expressly to make it unlawful for any employer "to pay, *lend,* or deliver" and for any representative "to receive or accept any payment, *loan,* or de[illegible]ery" of, "any money or other thing of value." The words "lend" and "loan" were deliberately and clearly added to Sections 302(a) and 302(b).

By contrast to the 1947 version of Section 302, the legislative history of the 1959 version of Section 302 does show direct Congressional attention to loans. The Congressional committee reports frankly acknowledge that the 1947 version of Section 302 failed to cover many areas in the labor-management field which Congress in 1959 undertook to regulate. The inadequacies in the 1947 version were frequently called ambiguities and "loopholes". For example, Senate Report No. 187, dated April 14, 1959, on S. 1555 ("Kennedy Bill"), reads:

> "Although these provisions of existing law [§ 302] punish *most* forms of *bribery* or *extortion* if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed *loopholes* which both employer representatives and union officials turned to advantage at the expense of employees. *The committee bill pro-*

poses to close the loopholes. * * *" (p. 13; emphasis supplied.)

Not only did the testimony reveal "loopholes", but Senator Kennedy[13] and Senator McClellan[14] both expressed the opinion that loans generally, and indeed the very loan in issue in this case, were *not* prohibited by the 1947 version of Section 302, and consequently that amendatory legislation was needed.[15]

The Government has selected from Senate and House committee reports the following language:

> "The purpose of these amendments to Section 302 is to forbid any payment, loan, or bribe by an employer, employer association or anyone acting on an employer's behalf, i.e., labor relations consultant. The demand or acceptance of such payment, loan or bribe is also proscribed." (Jurisdictional Statement, at p. 10).

All the reports cited by the government are to this effect. From that language, the government draws the inference that Congress was concerned with expanding the class of persons to whom Section 302 would apply, to include middle-men and trade associations, but that Congress was not concerned with the class of transactions which would be prohibited. We agree that Congress expanded the class of persons to whom Section 302 would apply. However, we fail to see any logic whatever in the government's contention that Congress was not equally concerned with expanding the class of transactions. One inference simply

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[13]Senator John F. Kennedy sponsored the Senate bill which was incorporated into the final 1959 amendment to the Taft-Hartley Act.

[14]Senator John McClellan served as Chairman of the Senate Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., 1st Sess., before which Committee the testimony was taken.

[15]See Hearings before "McClellan Committee", Part 7, pp. 2253-4, 2376, 2402 (1957).

does not exclude the other. The specific amendments are several, and each is entitled to respect by the Courts.

Of course, it is for Congress to determine that loans, as well as outright gifts, are so injurious to labor relations that they should be prohibited and penalized. But such determination is not self-evident, and was surely not expressed in Section 302 as enacted in 1947. The special and emphatic addition of "loans" to Section 302 in 1959, and the frank recognition of the ambiguity or "loophole" which the sponsors and draftsmen sought to clarify or "plug" by that addition of "loans" to Section 302, amount to a legislative interpretation that loans are *not* prohibited by the 1947 version of Section 302. This, too, invokes a cardinal principle of statutory construction: A legislative amendment which covers a "loophole", is conclusive proof that the earlier statute should be construed *differently* from the later statute. Let it suffice to quote Mr. Justice Butler in Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115, 74 L. ed. 457 (1930):

> "* * * the deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears." 280 U. S. at 337.

See also United States v. McClure, 305 U. S. 472, 59 S. Ct. 335, 83 L. ed. 296 (1939); Pierce v. United States, 314 U. S. 306, 62 S. Ct. 237, 86 L. ed. 226 (1941).

The hearings before the Senate Select Committee show conclusively that one of the transactions between employer and employee representative which required the attention of Congress was a loan transaction not included in the Labor-Management Relations Act of 1947. This type of loan transaction is now—and for the first time—within the proscription of federal labor-management legislation. The

loan transaction involved in the case at bar was not prohibited in 1954 when it occurred.

The dismissal of this indictment does not create a "loophole"; for the "loophole" was already there. The dismissal of the indictment does not create any dangerous judicial precedent; for the "loophole" has already been "plugged" by Congress.

* * *

For the foregoing reasons, the motion to affirm should be granted.

Respectfully submitted,

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No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., AND DAVE BECK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO AFFIRM OF APPELLEE DAVE BECK

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FRAYN LETTERPRESS

No. 941

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., AND DAVE BECK,

Defendants-Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC., BROWN EQUIPMENT AND MANUFACTURING CO., AND DAVE BECK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO AFFIRM OF APPELLEE DAVE BECK

Appellee Dave Beck moves that the final judgment of the District Court be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

OPINION BELOW

The ruling of the District Court (R. 80-81; Appendix A of Jurisdictional Statement), which dismissed the indictment herein, has not been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

Section 302 of the Labor Management Relations Act of 1947 made it unlawful for an employer to "pay or deliver" to a representative of any of his employees in an industry affecting interstate commerce, or for such representative to "receive or accept" from the employer, "any money or other thing of value." The question presented is whether a loan of money, evidenced by a promissory note and repaid with interest, comes within the foregoing prohibitions.

STATUTES INVOLVED

The pertinent provisions of Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C.A. 186, and Section 505 of the Labor Management Report and Disclosure Act of 1959, 73 Stat. 537, which amended said Section 302, are set forth in the Jurisdictional Statement at pp. 2-3.

STATEMENT

Defendant Appellee Dave Beck hereby adopts the statement of Defendant-Appellees Roy Fruehauf, Burge Seymour, Associated Transport, Inc. and Brown Equipment and Manufacturing Co. as set

forth in their motion to affirm and in the Statement of Fruehauf Trailer Co. as set forth in its motion to affirm.

Appellee Dave Beck was charged under the second count of the two-count indictment here involved under Section 302(b) of the Labor Management Relations Act of 1947. Aside from that technical difference, all of the issues as to this appellee are identical with the issues raised by the other appellees.

ARGUMENTS

Appellee has read and knows the contents of the brief and argument of the other appellees heretofore filed. Such motions and argument correctly set forth the facts and the law. Appellee Dave Beck therefore adopts each of such motions and arguments for and on his own behalf with respect to the second count of the indictment.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

Appellees offer two principal grounds in support of their motions to affirm.[1] They argue (1) that the words "pay or deliver," as used in Section 302(a) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186 ("It shall be unlawful for any employer to pay or deliver * * * any money or other thing of value to any representative * * *") do not fairly encompass a loan of money, or at least do not give fair warning that a loan transaction is for-

[1] One motion, referred to herein as "Fruehauf", has been filed by appellees Roy Fruehauf, Burge Seymour, Associated Transport, Inc., and the Brown Equipment and Manufacturing Co. Separate motions have been filed by appellees Fruehauf Trailer Co. and Dave Beck. The latter's motion merely adopts the motions of the other appellees.

bidden (Fruehauf, pp. 4–10; Fruehauf Trailer Co., pp. 6–11); and (2) that the legislative history of Section 302, when considered with the amendatory action taken by Congress in 1959 (which, *inter alia,* inserted the word "lend" in Section 302), shows that Congress did not intend to reach loans in the prior version of Section 302 (Fruehauf, pp. 10–17; Fruehauf Trailer Co., pp. 12–15). Neither contention is sound.

1. (a) In this, as in all cases which turn on the meaning of a word, resort must first be had to the language of the statute in which it is used. *Adams Express Company* v. *Kentucky,* 238 U.S. 190, 199. We pointed out in the jurisdictional statement that, in enacting Section 302, Congress recognized that employers and representatives gather at the bargaining table primarily to decide the rights of employees who are not physically present, and that it sought to insure that employers and representatives would bargain honestly and at arms length by forbidding all financial transactions between them other than the five classifications set forth in the statute itself.[2] To ban all payments except those expressly authorized Congress used broad but simple language—"It shall be unlawful for any employer to pay or deliver * * * any money or other thing of value to any representative of any of his employees * * *." Section 302, *supra.* Plainly that all-inclusive language is in terms broad enough to cover a loan of money. Since such a construction is consonant with the Congressional

[2] Appellees do not and can not contend that the loan of money out of which this prosecution arose comes within one of those exempted classifications.

purpose to prevent corruption of the bargaining process, the statute should be so read.

The phrase "deliver * * * any money or other thing of value" in its usual sense covers a loan of money. By dictionary definition, when used in a context appropriate to this case, "deliver" means "to give or transfer" something; "lend" means to allow the use of something, on the condition that it be returned. Webster's New International Dictionary (2d ed., 1958, Unabridged) pp. 693, 1415. Although every loan contemplates a transfer or delivery of something having specific identity (even though temporary), of course not all deliveries or transfers of money are loans. Appellees, in arguing that a delivery does not include a loan (Fruehauf, p. 5), are obviously mistaken in asserting that the word "deliver" is narrower than the term "lend" in ordinary meaning and, accordingly, that "deliver" is not wide enough to encompass "lend."

The five carefuly drawn exceptions in Section 302(c)[3] further indicate that, had Congress intended to except loan transactions from the prohibition against the "pay[ment] or deliver[y]" of money to a representative, it would have specifically done so. See *Benanti* v. *United States*, 355 U.S. 96, 105.[4]

[3] Those exceptions are: (1) money paid by an employer to a "representative who is an employee" as compensation for his services as an employee; (2) payments made in satisfaction of a judgment or award; (3) payments for goods purchased at the prevailing market price in the ordinary course of business; (4) "check-off" payments "in payment of membership dues in a labor organization"; and (5) payments to welfare funds administered jointly by the employers and employees.

[4] This Court's decision in *Arroyo* v. *United States*, 359 U.S. 419, is not pertinent to this case. There, the question was whether the payment to the representative was a payment to a

(b) The considerations discussed above largely dispose of appellees' alternative contention that Section 302 is too vague to be read as prohibiting a loan transaction. While the legislative draftsmen might have chosen to use a number of words of specific content, rather than two broad inclusive words like "pay" and "deliver", a statute does not become invalid because more specific phraseology is possible. All that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8. So measured, the language of Section 302 gives fair notice, in well-understood terms, that no payment or delivery of money or other thing of value is permitted unless specifically exempted from the operation of the statute. The section thus does not require the appellees to make as difficult a choice as that involved in many cases under legislation already upheld by this Court.[8]

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welfare fund and thus authorized under Section 302(c). This Court held that it was. No similar contention has been advanced by appellees in this case.

[8] *E.g.*, *Roth* v. *United States*, 354 U.S. 476, 491 (statute forbidding the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character"); *United States* v. *Harriss*, 347 U.S. 612 (statute applicable to anyone who solicits or collects money where the "principal purpose" of the person or the principal purpose of the solicitation or collection is to influence legislation by direct communication with legislators); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (regulation requiring the drivers of trucks carrying explosives to avoid "congested" routes "so far as practicable, and, where feasible"); *Dennis* v. *United States*, 341 U.S. 494 (statute forbidding any person to con-

2. In the jurisdictional statement, pp. 8–11, we argued that the amendment of Section 302 by Section 505 of the Labor-Management Reporting and Dis-

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spire "to knowingly or willfully advocate * * * or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence * * *"); *Kovacs* v. *Cooper*, 336 U.S. 77 (prohibition against "loud and raucous" sound trucks); *United States* v. *Petrillo*, 332 U.S. 1 (statute prohibiting coercion of radio stations to employ persons "in excess of the number of employees needed * * * to perform actual services"); *Arrews* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97 (prohibition against depriving any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 ("any offensive, derisive or annoying word"); *Gorin* v. *United States*, 312 U.S. 19 ("connected with" or "relating to" the national defense); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 (statute exempting fair trade agreements from operation of other laws only if the fair traded article was in "fair and open" competition with other products); *United States* v. *Wurzbach*, 280 U.S. 396 (no officer or employee of the United States may solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (pasturage of sheep forbidden if it would interfere with the "usual and customary" use of a cattle range); and *Nash* v. *United States*, 229 U.S. 373 (statute forbidding "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

Nothing in *United States* v. *Mersky*, 361 U.S. 431, is inconsistent with the government's position in this case. In *Mersky*, this Court held that a customs regulation, on its face, left "the distinct impression that it was intended to protect and expedite the collection of customs duties", rather than to change the requirements as to the markings to be affixed to imported goods after importation (*id.*, at 440–441). Here, there is no question but that Section 302 is directed at the regulation of financial dealings between employers and representatives.

closure Act of 1959, 73 Stat. 537, specifically to cover loans does not show that loans were not prohibited by the prior language, since the amendment was intended by Congress to make explicit what was already implicit in the existing language. We recognized (p. 10) that there was material in the legislative history that "points in the other direction." Appellees rely heavily on such material. As we previously stated, however, that material does not establish that, in extending the prohibitions of Section 302(c) to middlemen, Congress was broadening the prohibited transactions to reach a category not previously covered, namely, the payment or delivery of money as a loan. Such a loan payment, we submit, was covered by Section 302(c) as originally enacted in 1947, and later expressions to the contrary cannot alter the meaning of the 1947 Act. See *Fogarty* v. *United States*, 340 U.S. 8, 13–14; *United States* v. *Mine Workers*, 330 U.S. 258, 281–282; *Commissioner* v. *Acker*, 361 U.S. 87.

CONCLUSION

For the foregoing reasons, and those set forth in the jurisdictional statement, it is respectfully submitted that the motions to affirm should be denied and that probable jurisdiction of the appeal should be noted.

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A loan of money by an employer to a representative of his employees is prohibited by Section 302 of the Labor-Management Relations Act, 1947, which made it unlawful for an employer to pay or deliver to a representative of his employees, or for such representative to receive or accept from the employer, any money or other thing of value	12
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 91

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The oral ruling (R. 46) of the district court dismissing the indictment has not been reported.

JURISDICTION

On February 18, 1960, the district court dismissed the indictment on the ground that it did not charge an offense under Section 302 of the Labor-Management Relations Act, 1947, 61 Stat. 157 (R. 44–46). A notice of appeal to this Court was filed in the district court on March 18, 1960 (R. 47–48), and this Court noted probable jurisdiction on October 10, 1960 (R. 50). The jurisdiction of this Court to review on di-

rect appeal the decision of the district court dismissing the indictment, on the ground that it did not charge a crime within the meaning of the statute upon which it was founded, is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Section 302 of the Labor-Management Relations Act, 1947, made it unlawful for an employer to "pay or deliver" to a representative of any of his employees (in an industry affecting interstate commerce), or for such representative to "receive or accept" from the employer, "any money or other thing of value." The question presented is whether a loan of money comes within the foregoing prohibitions.

STATUTES INVOLVED

Section 302 of the Labor-Management Relations Act, 1947, 61 Stat. 157, 29 U.S.C. 186, provided, in part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * *

On September 14, 1959, Section 505 of the Labor-Management Reporting and Disclosure Act of 1959,

73 Stat. 537, amended Section 302, *supra*, to read in part, as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce * * *.
>
> * * * * * *
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).
>
> * * * * * *

STATEMENT

Section 302 (a) and (b) of the Labor-Management Relations Act, 1947, *supra*, made it an offense for an employer to "pay or deliver" to a representative of his employees engaged in an industry affecting interstate commerce, and for such representative to "receive or accept" from the employer, "any money or other thing of value." A two-count indictment filed on June 17, 1959, in the United States District Court for the Southern District of New York charged five defendant employers[1] with having paid and delivered

[1] The employers were Roy Freuhauf, the Freuhauf Trailer Co., Burge Seymour, Associated Transport, Inc., and the Brown Equipment and Manufacturing Co.

money in the amount of $200,000 to a representative of their employees (R. 5; count 1), and charged the defendant representative (Dave Beck) with having received the money (R. 6; count 2), in violation of Section 302 (a) and (b), respectively. In a pre-trial memorandum, the government stated that it intended to prove that the defendant employers had loaned $200,000, unsecured and at an actual interest rate of about 2%, to the defendant representative through an intricate exchange of checks; and that the loan was subsequently repaid by the representative (R. 10–14).

All the defendants orally moved to dismiss (R. 15, 28–29, 31, 33). After argument, the district court dismissed the indictment on the ground that Section 302, as it stood at the time of the offenses charged, did not cover loans of money. The court emphasized the fact that Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, *supra*, amended Section 302 of the 1947 Act to include specifically a prohibition upon loans (R. 45–46). The court stated (*ibid*):

> * * * Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not. I reject the argument that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that

> which I take it the Government urges was manifest before. I am, therefore, of the opinion that * * * the [loan] transaction was not an offense contemplated by the statute as it existed at the time.
>
> * * * * *
>
> I am now granting the motion of all defendants to dismiss the indictment upon the ground that it fails to charge an offense of the statute as it read at the time the transaction occurred.

SUMMARY OF ARGUMENT

The district court's conclusion—that Section 302 of the Labor-Management Relations Act, 1947, does not prohibit a loan transaction between an employer and the representative of his employees—is not supported by the language, legislative history, or purpose of the statute. We show that the literal language of the statute is broad enough to forbid any monetary exchange not expressly authorized, that Congress intended this broad coverage, and that the later amendment of Section 302 (in 1959) merely made explicit what already had been outlawed. We also point out that Section 302 is sufficiently definite and certain to justify the imposition of a criminal sanction for a loan of money.

A. Section 302 made it unlawful for an employer "to pay or deliver * * * any money or other thing of value" to a representative of his employees, and prohibited the receipt or acceptance thereof by the representative. The normal, ordinary, spontaneous meaning of the words "deliver" and

"receive" is broad enough to include loans of money, since the subject of the loan is both "deliver[ed]" and "receive[d]". That plain meaning should be followed unless the rest of the statute, its purpose, or its history directs otherwise.

This Court has already ascribed their literal meaning to other terms used in Section 302. Thus, the term "any representative of any employees" has been held to include individuals who represent employees in their relations with employers, whether or not the individual is the formal bargaining representative, *United States* v. *Ryan*, 350 U.S. 299; and a literal meaning has been ascribed to Section 302 (c)(5), dealing with welfare funds, *Arroyo* v. *United States*, 359 U.S. 419.

B. 1. The declared purpose of the Labor-Management Relations Act, 1947, is to protect interstate commerce by recognizing and securing the legitimate rights of employees, employers, and representatives in their relations with each other. One way in which Congress sought to reach that goal was by outlawing all unauthorized payments between employers and representatives, to insure that they would deal at arms length. A loan—particularly the loan of a large sum of money at a very low rate of interest (as in this case)—obviously can be just as effective a device for improperly influencing a union official as an unconditional gift, which is clearly forbidden by Section 302. It tends to engender the very same emotion—gratitude—in the representative; tends to have the same effect—a blurring of the representa-

tive's sense of fidelity to the employees—on the bargaining process; and tends to lead to the same evil result—a contract which is not based on good faith arms length collective bargaining. The broad language of Section 302 was intended to, and did, cover any delivery or receipt that might cause such an abuse. A loan is just as likely to do so as an outright gift.

2. The structure of Section 302 also points toward this construction. Subsections (a) and (b) set forth the broad prohibitions. The exceptions to these prohibitions are set forth in subsection (c). These exemptions are carefully defined, extremely detailed, and very narrow. They show that Congress knew how to draft exceptions to the broad prohibitions of Section 302, that it carefully considered the exceptions it wished to make, and that it enacted only those few exceptions which it deemed desirable. A loan is not one of the exemptions specifically enacted by Congress.

C. 1. The legislative history of Section 302 shows that Congress intended to prohibit all financial dealings and all exchanges of money between employers and representatives except those expressly authorized. Section 302 had its origin in a floor amendment by Senator Byrd to the Case Bill (H.R. 4908, 79th Cong., 2d Sess.). Prior to that time, the only statutory prohibition against financial dealings between employers and representatives was one which made it an unfair labor practice for an employer to contribute financial support to a labor organization. The Byrd proposal would have made it unlawful for any employer to pay,

or any representative to receive money unless the payment was for services as an employee or was for union dues withheld by an employer under a "check-off" agreement. It was quickly pointed out by opponents of the amendment that the language was so broad as to forbid all other transactions involving money or valuables, many of which were otherwise innocent transactions. Advocates of the amendment replied that that was precisely what they intended to accomplish. After extensive debate, during which other limited exceptions were added to the proposal, the amendment was adopted by the Senate and accepted by the House. The President, however, vetoed the Case Bill, which failed to pass over the veto.

2. H.R. 3020, Congressman Hartley's bill in the 80th Congress, 1st Session, as passed by the House, did not contain a provision similar to Section 302. Instead, it continued the "unfair labor practice" treatment of the earlier law. The Senate Committee on Labor and Public Welfare held hearings on H.R. 3020 and various other bills, one of which (S. 55, 80th Cong., 1st Sess.) contained a section which was essentially the Byrd amendment of the previous year (*id.*, Section 201). During the hearings held on these bills, the committee discussed the breadth of the language used in the proposed prohibition, and the sponsors of S. 55 made it clear that they had deliberately chosen that sweeping prohibitory language.

The Senate committee reported an original bill which did not contain any provision similar to the Byrd amendment of the prior year. A minority of the committee criticized the reported bill on this ground, stating that they would introduce an amendment, from the floor, to prohibit all unauthorized financial transactions between employers and representatives. The Senate again adopted this floor amendment in the face of warnings that the language prohibited every form of financial transaction which was not expressly authorized. Ultimately, this amendment became law as Section 302.

Congress therefore knew, when it adopted Section 302, that the section would prohibit every unauthorized financial exchange between employers and representatives, including many which would be innocent were it not for the positions occupied by the employer and the representative. Knowing this, Congress nevertheless adopted the broad prohibition, because it deemed such transactions to be an evil when they took place in an employer-representative context.

D. 1. Congress was concerned with a totally different problem in 1959 when it amended Section 302. It was primarily concerned with extending the prohibitions of Section 302 to "middlemen"—those persons who made payments to representatives on behalf of employers, even though not technically agents of the employers. There is nothing to indicate that, in add-

ing the words "lend" and "loan" to Section 302, the Senate believed it was expanding the statute to reach payments of a kind not previously covered. The Senate committee report (No. 187, 86th Cong., 1st Sess.) which accompanied the amendment made no express reference to the addition of the word "lend", although the report did discuss the other amendments at some length. Furthermore, this report noted that Section 302, as it then read, already contained a flat prohibition against unauthorized deliveries and receipts of money or other things of value. Thus, there is no reason to infer that the addition in 1959 of the words "lend" and "loan" served any other purpose than to make explicit what was already forbidden by Section 302, as enacted in 1947.

2. The district court in its order, and appellees in their motions to affirm, have relied on other materials in the legislative history of the amendment to Section 302 which were believed to point to the construction that the 1959 amendment enlarged Section 302. The loan which lies at the root of this prosecution was (in 1957) the subject of hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field. Senator Kennedy at the time indicated in general terms that there might not be any law forbidding this exchange of money, but the committee in its interim report did not comment on that matter; instead, the committee confined itself to the "management middlemen" problem. Appellees also rely upon a statement by Senator Goldwater to the effect that the

legislative proposal to amend Section 302 would *add* a prohibition against loans. This can hardly be taken as an expression of the opinion of the Senate or the Senate committee, however, since Senator Goldwater opposed the reporting of the bill and was the only Senator to vote against its passage.

3. Even if it is assumed that in 1959 Congress clearly indicated that it believed that Section 302 as enacted in 1947 was not sufficiently broad to forbid loans, that later expression, as this Court has held, cannot be said to alter the meaning of the 1947 Act. This rule is particularly sound here, in view of the legislative materials relied upon by the district court and appellees in this case which relate to the supposed position of one member of Congress who was not a sponsor of the 1947 Act and of another who was not a member of Congress at that time.

E. In their motions to affirm, appellees offered an alternative contention that the 1947 version of Section 302 is too vague to be read as prohibiting a loan transaction. While the legislative draftsmen might have chosen to use a number of words of specific content, rather than broad inclusive words like "pay", "deliver", and "receive", a statute does not become invalid because more specific phraseology is possible. The language of Section 302 gives fair notice, in well-understood terms, that no delivery or receipt of money or other thing of value is permitted unless specifically exempted from the operation of the statute. The standard of certainty requires no more than this.

ARGUMENT

A LOAN OF MONEY BY AN EMPLOYER TO A REPRESENTATIVE OF HIS EMPLOYEES IS PROHIBITED BY SECTION 302 OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, WHICH MADE IT UNLAWFUL FOR AN EMPLOYER TO PAY OR DELIVER TO A REPRESENTATIVE OF HIS EMPLOYEES, OR FOR SUCH REPRESENTATIVE TO RECEIVE OR ACCEPT FROM THE EMPLOYER, ANY MONEY OR OTHER THING OF VALUE

The district court's conclusion—that Section 302 of the Labor-Management Relations Act, 1947, 61 Stat. 157, 29 U.S.C. 186, did not prohibit a loan transaction between an employer and a representative of any of his employees in an industry affecting interstate commerce—is not supported by the language, legislative history, or purpose of the statute. We show that the literal language of the statute is sufficiently broad to forbid any monetary exchange save those expressly authorized, that Congress intended this broad coverage, and that the amendment in this respect of Section 302 by Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, merely made explicit what already had been outlawed. We also point out that there is no sound basis for any contention that Section 302 is too vague to justify the imposition of a criminal sanction for a loan of money.

A. *The language used by Congress, when taken in its usual sense, covers a loan of money.*

In this, as in all cases which turn on the meaning of a word, resort must first be had to the language of the statute in which it is used. Cf. *Adams Express*

Company v. *Kentucky*, 238 U.S. 190, 199; *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349, 351. As enacted in 1947, Section 302 made it unlawful for an employer "to pay or deliver * * * any money or other thing of value" to a representative of his employees, and prohibited the receipt or acceptance thereof by the representative. According to the dictionary, "deliver" means "to give or transfer" something; "receive" means "to take, as something that is offered"; "lend" means to allow the use of something, on the condition that it be returned. Webster's *New International Dictionary* (2d ed., 1958, Unabridged), pp. 693, 1415, 2076. Every loan contemplates a transfer, delivery, or acceptance of something having specific identity (even though temporary), although of course not all deliveries, acceptances, or transfers are loans. The words "deliver" and "receive" are thus broader than the term "lend" in ordinary meaning. When an employer makes a loan to a representative, he "pay[s] or deliver[s] * * * money" to the representative, and the latter "receive[s] or accept[s]" the money from the employer. The normal, ordinary, spontaneous meaning of "deliver" and "receive" includes loans. That meaning should be followed unless the rest of the statute, its purpose, or its history directs otherwise. "'[T]here is no canon [of construction] against using common sense in construing laws as saying what they obviously mean'". *Arroyo* v. *United States*, 359 U.S. 419, 424, quoting from *Roschen* v. *Ward*, 279 U.S. 337, 339; see *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617-618; *Jones* v. *Liberty Glass*

Co., 332 U.S. 524, 531; *National Labor Relations Board* v. *Highland Park Co.*, 341 U.S. 322, 324–325. Quite the contrary, "[w]e should not read out [of a criminal statute] what as a matter of ordinary English speech is in." *United States* v. *Hood*, 343 U.S. 148, 151.

This Court has already ascribed their literal meaning to other terms used in Section 302. In *United States* v. *Ryan*, 350 U.S. 299, the Court noted that the literal meaning of the phrase "any representative of any employees" strongly suggested that the phrase included a person who represented employees as a union president and principal negotiator, even though the union itself was the exclusive bargaining representative of the employees (*id.* at 301–302). Reinforcing its conclusion by reliance upon a textual analysis of the section and its legislative history (*id.* at 302–305), the Court held that Section 302 broadly prohibits payments by employers to individuals who represent employees in their relations with employers, whether or not the individual is the formal bargaining representative, saying that "a narrow construction would frustrate the primary intent of Congress" (*id.* at 305, 307). Again, in *Arroyo* v. *United States*, 359 U.S. 419, the Court accorded its literal meaning to Section 302(c)(5), holding that the transaction involved in that case "was within the precise language" of the subsection (*id.* at 423). We ask for no more in this case. The "broad prohibition" (*United States* v. *Ryan, supra*, 350 U.S. at 305) found in Section 302 should be construed to encompass loans

as well as gifts, since "deliver" and "receive" include loans of money in ordinary parlance.

B. *The purpose and context of Section 302 accord with the literal meaning of its language.*

1. Section 1 of the Labor-Management Relations Act, 1947, declared that it was the purpose and policy of Congress, in order to promote the full flow of commerce, "* * * to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for *preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare * * *" (emphasis added). One of the major purposes of Congress in the 1947 Act was to prevent employers from tampering with the loyalty of union officials. By "outlaw[ing] all [unauthorized] payments * * * between employer and representative" (*United States* v. *Ryan, supra,* 350 U.S. at 305), Section 302 was designed to protect the integrity of the collective bargaining process by insuring that employers and representatives would deal at arms length. Recognizing that the employee whose rights are fixed by the contract is not physically present at the bargaining table and that he thus is entitled to an extra measure of protection, Congress intended to avoid such obvious dangers to employee rights as bribery of the

sentative (92 Cong. Rec. 4893), extortion by the representative (93 Cong. Rec. 4679), and diversion of welfare funds by representatives to political or personal purposes (93 Cong. Rec. 4678; S. Rep. 105, 80th Cong., 1st Sess., p. 52).

A loan—particularly the loan of a large sum of money at a very low rate of interest—obviously can be just as effective a device for improperly influencing a union official as an unconditional gift. No one doubts but that an outright gift of $500 passing from employer to representative is forbidden by Section 302. *United States* v. *Ryan*, *supra*, 350 U.S. at 300. No more need be shown than the gift itself. It is not necessary to show that the collective bargaining process was actually influenced by the gift—Congress struck at the mere possibility of abuse by outlawing *all* deliveries and *all* receipts of money (apart from those specifically excepted by the statute). A loan of $200,000 by an employer to a representative at an effective interest rate of just over 2% (which is this case (R. 12–13)) creates the very same possibility of abuse as does a gift. If the normal interest rate for unsecured loans at what would be a low rate is 4% (the *stated* rate of interest in this case, *ibid.*), the saving in interest alone amounts to a gift of $4,000 a year. When compared to a gift, this sort of loan tends to engender the very same emotion—gratitude—in the representative; tends to have the same effect—a blurring of the representative's sense of fidelity to the employees—on the bargaining process; and tends to lead to the same evil result—a collective bargaining relationship which is not based on good faith arms

length collective bargaining. The broad language of Section 302 was intended to, and did, cover any delivery or receipt that *might* cause such an abuse. A loan is just as likely to do so as an outright gift.

2. The structure of Section 302 also points toward this interpretation. Subsections (a) and (b) set forth the broad prohibitions already discussed. Exceptions to those prohibitions are set forth in subsection (c). These exemptions are: (1) money paid by an employer to "any representative who is an employee" as compensation for his services as an employee; (2) payments made in satisfaction of a judgment or award, or in settlement of a claim; (3) payments for goods purchased at the prevailing market price in the ordinary course of business; (4) "check-off" payments "in payment of membership dues in a labor organization"; and (5) payments to welfare funds administered jointly by the employers and employees.[2]

These exemptions are extremely detailed and obviously carefully molded to cover only those situations which Congress conceived to be normally free from the possibility of abuse. Thus, money may be paid to settle a claim only in the absence of fraud or duress. Membership dues may be "checked off" only if each individual employee has, in writing, expressly authorized that deduction from his wages; moreover, the authorization must be subject to termination at reasonable intervals. Welfare funds may be paid only

[2] Appellees have not contended, and cannot contend, that the loan of money out of which this prosecution arose comes within any of these exempted classifications.

for specified purposes, to benefit specified groups of persons, subject to specified control, and pursuant to a detailed written plan. It is apparent, therefore, that Congress knew how to draft exceptions to the broad prohibitions of Section 302, that it gave careful consideration to the exceptions it wished to make, and that it enacted those few exceptions it deemed desirable. This is persuasive evidence that, had Congress intended to except loan transactions from the prohibitions against the payment or delivery of money to a representative, it would have specifically done so. See *Benanti* v. *United States*, 355 U.S. 96, 105.

C. *The legislative history shows the intent to prohibit all financial dealings except those specifically authorized.*

The legislative history of Section 302, from its original language in the Case Bill (H.R. 4908, 79th Cong., 2d Sess.) to its final version in the Taft-Hartley Act, affirmatively shows a general Congressional intent to protect the integrity of the collective bargaining process by prohibiting *all* financial dealings and *all* exchanges of money between employers and representatives of their employees, except monetary exchanges falling within the five carefully defined and severely limited exceptions set forth in the section. That history shows that Congress sought to prohibit any representative from receiving money or any thing of value from any employer in a situation where the representative would receive a personal benefit from, or be personally involved in, the transaction.

1. Section 302 had its origin in an amendment to the Case Bill when Senator Byrd proposed from the floor in the 79th Congress. Prior to that time, the only statutory prohibition against financial dealings between employers and representatives was to be found in Section 8(a) of the National Labor Relations Act, 29 U.S.C. (1946 ed.) 158, which made it an unfair labor practice for an employer to contribute financial support to a labor organization. Senator Byrd proposed an amendment forbidding any payment by an employer, or any receipt by a representative, unless the payment was for services as an employee, or was for union dues withheld by the employer under a "check-off" agreement. 92 Cong. Rec. 4809. The Senator explained briefly that the purpose of his amendment was to insure that no funds would be paid by an employer or received by a representative if the representative was to have exclusive control over the fund. 92 Cong. Rec. 4891–4895. Pointing out that his amendment would not forbid the establishment of health and welfare programs subject to joint control, Senator Byrd declared (92 Cong. Rec. 4893):

> With respect to such [interstate] goods, it prohibits the employer to pay, or any representative of any of his employees to collect, or attempt to collect, any money or other thing of value, *for the use of such representative, or in trust or otherwise.* [Emphasis added.]

Senator Pepper, who led the opposition to the amendment, contended that the language was so broad as to forbid contributions to union-sponsored recreational

organizations or functions, such as baseball teams, dances, and picnics.[3] As he read the prohibitory language of the proposed amendment, "[t]hat language forbids *every* type of delivery by employer to employees and *every* type of receipt by employees from employers, except two * * * payment of compensation for services rendered, and * * * the so-called check-off." 92 Cong. Rec. 4895.

Thereafter, the precise language of the proposed amendment was "written in on the floor" of the Senate.[4] Various modifications were adopted to permit payments (and negotiations for payments) for welfare funds subject to joint control. 92 Cong. Rec. 4900, 5040, 5277. As modified, it was still the opinion of the amendment's opponents that the Byrd amendment would forbid all other transactions involving money or valuables—even the granting of a railroad pass—between employers and representatives. 92 Cong. Rec. 5079, 5336–5337. That was precisely what the advocates of the amendment intended. "I assert," said Senator Taft, "that once we permit an agent [representative] to obtain money *for his own use, or for any purpose,* it is affirmatively a dubious practice, an immoral practice, and unless it is used for purposes which are properly defined [by law], it should not be permitted" (emphasis added). 92 Cong. Rec. 5466.

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[3] It was pointed out in rebuttal that such payments were probably already forbidden as unfair labor practices. 92 Cong. Rec. 4899.

[4] Hearings before the Senate Committee on Labor and Public Welfare on the Labor Relations Program, 80th Cong., 1st Sess., p. 12.

The time for a vote on the amendment drew nearer, and this colloquy took place (92 Cong. Rec. 5496–5497):

> Mr. TUNNELL. * * * The Byrd amendment provides as follows:
>
> "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees * * *."
>
> Does that not prohibit all sorts of contributions?
>
> Mr. PEPPER. Exactly.
>
> * * * * * *
>
> Mr. TUNNELL. * * * [E]verything is prohibited in the Byrd amendment with the exceptions [wages, dues checkoff, and welfare funds] which have been stated?
>
> Mr. PEPPER. The Senator is absolutely correct.

Again and again, as the debate continued, it was observed that the amendment "contains a flat unequivocal and unrestrained prohibition against the payment [or delivery] of any sum of money". 92 Cong. Rec. 5499, 5502, 5516.

The Byrd amendment finally came to a vote and was adopted by the Senate. 92 Cong. Rec. 5521–5522. Then the Case Bill passed. 92 Cong. Rec. 5739. The House accepted the Senate amendments (92 Cong. Rec. 5946), but the President vetoed the bill (92 Cong. Rec. 6674–6678) and it failed to pass over his veto. 92 Cong. Rec. 6678.

2. The following (80th) Congress also undertook to revise the Wagner Act. H.R. 3020, introduced by

Congressman Hartley during the first session, passed the House with a provision (Section 8(a)) continuing the treatment of payments by an employer to a representative as an unfair labor practice, but did not contain any other provision similar to what is now Section 302. 93 Cong. Rec. 3671, H. Rep. 245, 80th Cong., 1st Sess., p. 29.

H.R. 3020 was referred to the Senate Committee on Labor and Public Welfare. At the same time, the Committee considered (among other bills) S. 55, 80th Cong., 1st Sess., which was "a rather extensively revised draft of H.R. 4908, the so-called Case bill [of the 79th Congress]," introduced by Senators Taft, Ball, and Smith. Hearings before the Senate Committee on Labor and Public Welfare on the Labor Relations Program, 80th Cong., 1st Sess., p. 9.[5] Section 201 of this bill (S. 55) was essentially the Byrd amendment of the previous year. During the course of the hearings on the various bills, Senator Pepper called attention to the breadth of the language in Section 201 of S. 55 ("pay or deliver any money or other thing of value to any representative"), saying (1947 Senate Committee Hearings, p. 52):

> * * * I do call attention to the generality of that language and the debate that the chairman will recall we had on the floor, where even the question of contributions to recreation funds and baseball teams and other similar things that are, I suppose, not intended to be prohibited, were discussed.

[5] These hearings, which were lengthy, will be cited hereafter as 1947 Senate Committee Hearings.

The committee chairman, Senator Taft, indicated that he felt that the specific contributions referred to were already forbidden as an unfair labor practice. Then this exchange took place (1947 Senate Committee Hearings, pp. 52–53):

> Senator PEPPER. * * * I just want to make sure that it is the intention of the authors to only safeguard the welfare funds and to prevent extortion and other improper contributions on the part of the employer, but if it is literally intended to mean exactly everything that the words say, I am glad to have that point clarified. I take it that that was intended.
>
> The CHAIRMAN. Yes; it is intended to mean that all the money that the employer pays out is paid out only because it is earned by the employee. * * *
>
> Senator PEPPER. But the language goes so far beyond that. If it [the employer] made available anything of value to any representative of the employees, whether they are organized or not, it would be forbidden. * * *
>
> I am merely calling attention to the fact that I think it goes far beyond the intended restraints of the author.
>
> The CHAIRMAN. No; I don't think it does. I think that is the intent of the provision. * * *.

In short, Senator Taft—who made his remarks in the presence of Senators Ball and Smith, the co-sponsors of S. 55 (*id.*, pp. 50–51, 53–55)—was well aware of the breadth of the prohibitory language used in Section 201 of S. 55. The choice of that language was a considered choice.

Witnesses before the Senate committee noted, and called attention to, the breadth of the proposed statutory language. William Green, at that time head of the American Federation of Labor, pointed out that the language was so sweeping as to outlaw dues "check-off" arrangements (1947 Senate Committee Hearings, pp. 978):

> [The language is] a blanket and sweeping prohibition against contributions or payments of any sort by employers to unions or union representatives followed by an enumeration of certain limited exceptions to the prohibition. These exceptions, however, are so narrow and so limited as to leave open for prosecution a vast number of innocent and customary transactions between employers and unions or union representatives. Among the most important of these customary transactions is the dues checkoff arrangement established through the process of collective bargaining. * * *

Senator Taft responded, "Mr. Green, I agree that the provision may be too broad in this bill on check-off * * *" (*id.*, p. 979). Joseph A. Beirne, President of the National Federation of Telephone Workers, also asked that Section 201 of S. 55 be amended to permit "check-off" arrangements (*id.*, p. 1180), at the same time noting that he read the language as eliminating "any kind of dishonesty, where money would change hands," and that he favored such legislation (*id.*, p. 1182).

After completing its hearings, the Senate committee reported an original bill, S. 1126, to accomplish the same objects as H.R. 3020 (the bill which had passed the House). 93 Cong. Rec. 3613. This

bill did not contain any provision similar to the Byrd amendment of the preceding year. A minority of the committee, including Senators Taft, Ball, Smith, Donnell, and Jenner, filed their "Supplemental Views" in which they stated that the failure of the committee bill to cover employer payments to representatives left a definite evil uncovered. They declared their intention to introduce amendments from the floor of the Senate; one of these was to be a slightly modified version of Section 201 of S. 55. S. Rep. 105, 80th Cong., 1st Sess., pp. 50, 52–53, 56. As promised, Senator Ball introduced Section 302 as an amendment to S. 1126 when the bill was taken up for debate. 93 Cong. Rec. 4677. There it was pointed out by opponents of the section that its prohibitory language was sufficiently broad to forbid "Christmas presents or birthday presents or anything of that type", and every other form of financial transaction not expressly excepted. 93 Cong. Rec. 4748. Nevertheless, the Senate adopted the amendment (93 Cong. Rec. 4754), it was accepted by the conference committee (H. Rep. 510, 80th Cong., 1st Sess., pp. 24–25, 66–67),[6] and it became law as part of the Labor-Management Relations Act, 1947.

From first to last, then, the legislative history shows that Congress was fully aware of the breadth of the language which it used. "Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is sup-

[6] Senators Taft and Ball were two of the four Senate members on the conference committee. H. Rep. 510, p. 29.

ported neither by the legislative history nor the structure of the section." *United States* v. *Ryan, supra,* 350 U.S. at 305. Congress knew, and intended, that its language would forbid every sort of financial transaction between employers and representatives not expressly authorized. It knew that Section 302 would prohibit many exchanges of money which would be innocent were it not for the positions occupied by the employer and representative, and condemned those exchanges solely because of the havoc which those exchanges *could* work on the collective bargaining process. In short, Congress deemed each and every unauthorized financial transaction between employers and representatives to be an evil, and forbade all of them. A loan is one of those forbidden exchanges of money.

D. *The district court erred in inferring that Section 302 would not have been amended in 1959 specifically to cover loans if Congress thought that Section 302 as originally enacted in 1947 included loans of money by employers to representatives.*

In 1959, Congress enacted Section 505 of the Labor-Management Reporting and Disclosure Act, *supra,* pp. 2–3, which amended Section 302(a), *supra,* to read, in part, that "[i]t shall be unlawful for any employer * * * or any person * * * who acts in the interest of an employer to pay, lend, or deliver * * * any money or other thing of value—(1) to any representative * * *." Section 302(b), *supra,* was changed to forbid the receipt by a representative of "any payment, loan, or delivery of any money or

other thing of value * * *." The basis for the order dismissing the indictment in the present case was the district court's conclusion that this amendment was intended to broaden Section 302 to reach conduct not already prohibited—in this case, a loan (R. 45). "I reject[1] the argument," said the district judge,

> that the subsequent action and the legislative history upon which that action was predicated by the Congress in 1959 in injecting into the statute the specific words dealing with a loan were intended to broaden that which I take it the Government urges was manifest before. I am, therefore, of the opinion that on the extrinsic evidence offered to be introduced by the Government and its judicial admission the transaction was not an offense contemplated by the statute as it existed at the time [of the loan].

Congress in 1959 was primarily concerned with a totally different problem. The first proposal to add the words "lend" or "loan" to Section 302, *supra*, was contained in Section 607 of S. 3974, 85th Cong., 2d Sess., a bill which was passed by the Senate (104 Cong. Rec. 11487), but not by the House. Section 607 would have amended Section 302(a) so as to make it "unlawful for any employer or any person who acts as a labor relations expert, adviser, or consultant to an employer to pay, lend, or deliver * * * any money or other thing of value" to a representative of the employer's employees. No comparable change was proposed in Section 302(b). The Senate committee

[1] In view of the court's statement, this word should probably be "accept".

report on the bill stated (S. Rep. 1684, 85th Cong., 2d Sess., pp. 43–44) that the purpose of Section 607 was "to forbid any payment or bribe by an employer or anyone acting on his behalf, whether technically an agent or not, and to forbid the receipt of any such bribe by any person, whether an individual, an officer, or employee of a labor organization, or a committee representing employees."[8] To say, as appellees must, that this explanation means that the Senate committee thought that, by its proposed language, it was reaching bribery by way of loan for the first time is fallacious. By the very same reasoning, it can be concluded that the Senate committee thought that it was outlawing bribery accomplished by gift for the first time. The explanation gives as much support for the latter conclusion as for the former. Yet the latter conclusion, in the light of the legislative history of Section 302 and its judicial construction as of 1958, is wholly and concededly without foundation. Thus, it can be said only that the purpose of the proposed amendment was to extend the prohibitions of Section 302 to "middlemen", *i.e.*, individuals who were not themselves employees or employers' agents but dealt with employee representatives on behalf of employers. There is nothing to indicate that, in adding the word "lend", the Senate believed it was expanding the statute to reach payments of a kind not previously covered.

In the next Congress, the Senate Committee on Labor and Public Welfare reported S. 1555, 86th

[8] S. Rep. 1684 refers to Section 608, which became Section 607 in S. 3974 as passed by the Senate.

Cong., 1st Sess. (the Kennedy-Ervin Bill, as amended). Section 111 proposed to amend Section 302(a) in substantially the same way as had Section 607 of S. 3974 in the preceding year. The Senate report (No. 187, 86th Cong., 1st Sess.) which accompanied the committee bill made no specific reference to the addition of the word "lend" to Section 302(a), although the report did discuss the other amendments at some length. For example, after discussing the problem of payments by middlemen, the report said (*id.*, p. 11):

> The committee bill attacks these problems on three fronts.
>
> First, it makes improper payments by management middlemen criminal offenses under section 302 of the Labor-Management Relations Act. *Section 302 already prohibits any payment by an employer to any representative of any of his employers* * * * [unless specifically excepted]. Section 111 of the committee bill would make Section 302 applicable to—[persons acting for employers]. * * *
>
> Second, the committee bill expands section 302 to cover * * * payments * * * [which amount to unfair labor practices].
>
> Third, the committee bill relies upon a system of reporting and disclosure to apply further corrective curbs on improper employer activity. [Emphasis added.]

Later, the committee report noted (*id.*, p. 13):

> Section 111 of the committee bill strengthens section 302 of the Labor-Management Relations Act by making it applicable to all forms of

extortion and bribery in labor-management relations some of which *may* slip through the present law.

Section 302(a) of the Labor-Management Relations Act provides—

"It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Section 302(b) forbids the receipt of such payments. * * *

Although these provisions of existing law would punish most forms of bribery or extortion if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed *loopholes which both employer representatives and union officials turned to advantage* at the expense of employees. The committee bill proposes to close the loopholes. * * * [Emphasis added.]

Again, it is clear that the committee was aiming primarily at payments by persons acting for employers, and regarded that situation as the "loophole" intended to be closed.

Finally, in its section-by-section analysis of the reported bill, the Senate committee said (S. Rep. 187, *supra*, at p. 43):

Section 111: Amends sections 302 (a), (b), and (c) of the Labor-Management Relations Act, 1947, as amended, primarily for the purpose of clarifying an ambiguity which presently exists. Under present law it is illegal for an employer to pay or deliver anything of value

> to a representative of his employees. The amendments contained in this section would remove any doubt that all forms of bribery and extortion which *might* escape the provisions of existing law would be prohibited under pain of criminal penalties for conviction thereof. *The intent of these amendments to sections 302 (a) and (b) is to forbid any payment or bribe by an employer of anyone who acts in the interest of an employer whether technically an agent or not and to forbid the receipt of any such bribe by any person, whether an individual, an officer or employee of a labor organization or a committee representing employees.* * * * [Emphasis added.]

Once again, the Senate committee made it plain that it was directing its attention to persons acting for employers or labor officials, rather than to any supposed problem concerning loans.

Section 111 of S. 1555 became Section 211 of the Senate bill upon passage. 105 Cong. Rec. 6745. The House Committee on Education and Labor, to which S. 1555 was referred, used the Senate bill as "the basis of [its] work" in preparing the bill which it reported (H.R. 8342, 86th Cong., 1st Sess.), and it accepted all of the Senate's proposed amendments to Section 302. It added associations of employers to the group forbidden to make payments, and changed Section 302(b) of the 1947 Act to reflect the language of Section 302(a), as amended by the Senate. H.R. 8342, 86th Cong., 1st Sess., Section 505; H. Rep. 741, 86th Cong., 1st Sess., p. 77. Nowhere, however, did the committee give any indication that it had specifically considered the question of loans, or that it regarded the new

language as reaching an area (loans) not previously covered. H. Rep. 741, *supra*, pp. 10, 46–47. Although the text of H.R. 8400, 86th Cong., 1st Sess. (the Landrum-Griffin bill) was substituted for the text of H.R. 8342, *supra*, on the floor of the House, this did not work any change in Section 505, which became law in the same form it had as Section 211 of S. 1555, as amended by the House committee. 73 Stat. 537.

Thus, the 86th Congress (and the Senate in the 85th Congress) were primarily concerned with the problem posed by payments made by persons acting in the interest of employers or groups of employers to labor union officials or employees, whatever the technical relationship between the parties. The other changes, such as the addition of the words "lend" and "loan", serve only to make explicit what was already forbidden by Section 302 as amended in 1947. There is no authoritative indication that either House thought that, with respect to loans, the new statute would go beyond the 1947 Act.

2. The district court in its order, and appellees in their motions to affirm, relied on other materials in the legislative history of Section 505 which were believed to point to the construction that the 1959 amendment enlarged Section 302. Particular reliance was placed upon statements made before the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) when it focused its attentions on the activities of appellees. The loan which lies at the root of this prosecution was uncovered, and testimony concerning

it was heard by the committee, beginning on May 13, 1957. Hearings before the Senate Select Committee on Improper Activities in the Labor or Management Field, Part 7, pp. 2197, 2201–2224, 2226–2229, 2252–2253, 2255, 2282.[*] On May 16, 1957, Senator Kennedy undertook to summarize what had been learned about the dealings of appellee Beck. In passing, he touched on this loan, saying, at one point, that "there probably is no law under which they [the employers] could be held liable", and, at another point, "there is no law against it". Select Committee Hearings, Part 7, pp. 2402–2403. These remarks, of course, cannot be read as indicating any fixed opinion either way. Moreover, they should be read in connection with Senator Kennedy's statement three days earlier to the effect that perhaps the committee should recommend limitations on "personal financial dealings" between employers and representatives (*id.*, p. 2253). It is perfectly clear that at least the greater part of such transactions (bribes, gifts, and extortions) were already outlawed, so these remarks should be read only as a suggestion that Congress should make explicit what was already broadly covered. In any case, the McClellan Committee in its interim report (S. Rep. 1417, 85th Cong., 2d Sess.), while it discussed this loan (*id.*, pp. 66–69), did not express the view that the loan was not forbidden by law. It referred to the loan as improper (*id.*, pp. 85–86),

[*] The hearings before, and reports of, this committee will be referred to as "Select Committee Hearings" and "Select Committee Reports".

but did not recommend legislation which in terms would forbid such loans. Rather, the committee confined itself to the "management middlemen" problem (*id.*, p. 452; see *id.*, pp. 450–453).

Appellees also have pointed to a prepared statement submitted by Senator Goldwater at a hearing before the Joint Subcommittee of the House Committee on Education and Labor, where the Senator stated that he regarded Section 211 of S. 1555 as *adding* a prohibition on loans to Section 302 of the Taft-Hartley Act. Hearings before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., on H.R. 3540 and Related Bills, Part 4, pp. 1604, 1627.[10] This can hardly be taken as an expression of the opinion of the Senate or the Senate committees, however, since Senator Goldwater opposed the reporting of S. 1555, and was the only Senator to vote against its passage (*id.*, pp. 1593, 1639). Appellees have also relied upon a statement by Mr. Meany, President of the A.F.L.-C.I.O., which can be read as approving the use of explicit language as to loans, but not as suggesting that such language would cover a new area (*id.*, Part 1, p. 103), and a statement by the United States Chamber of Commerce which is favorable to appellees (Hearings before a Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on Labor-Management Reform Legislation, 86th Cong., 1st Sess., p. 230). Such a private view was not reflected in the various committee reports, however, and is of no moment.

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[10] A revised form of this statement was also printed in the Congressional Record. 105 Cong. Rec. 10094, 10099.

3. Even if it could be said—which it cannot—that in 1959 Congress clearly indicated that it believed that Section 302 as enacted in 1947 was not sufficiently broad to forbid loans, that later expression could not be said to alter the meaning of the 1947 Act. In fact, "such interpretation has very little, if any, significance" in determining the contemporaneous intent of Congress in passing Section 302 in 1947. *Rainwater* v. *United States*, 356 U.S. 590, 593; *Fogarty* v. *United States*, 340 U.S. 8; 13-14; *United States* v. *Mine Workers*, 330 U.S. 258, 281-282; see *Commissioner* v. *Acker*, 361 U.S. 87, 92-93. "We fail to see", said this Court in *Mine Workers, supra,* at p. 282, "how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932 * * *."

The validity of this line of decisions is shown by the materials cited by the district court and appellees in this case. Heavy reliance is placed upon general remarks by Senator Kennedy in 1957 and on an analysis of the 1959 amendment prepared by Senator Goldwater. Even if Senator Kennedy's statements are taken as supporting appellees' position—which we do not believe that they do—the fact remains that the Senator was not a member of the House of Representatives in 1946 when the Case Bill containing the Byrd amendment came before it. 92 Cong. Rec. 5946. He was a member of the House in 1947, but H.R. 3020 (the Hartley bill) did not contain Section 302 as it

originally passed the House (*supra*, pp. 21–22; see 93 Cong. Rec. 3634–3635, 3671). After the Senate had added Section 302 to its bill (S. 1126) and the Conference Committee had agreed to retain the section in H.R. 3020 (*supra*, p. 25), then Congressman Kennedy voted against agreeing to the conference report (93 Cong. Rec. 6361, 6368, 6392–6393) and later voted to sustain the President's veto of the Taft-Hartley Act. 93 Cong. Rec. 7489. As for Senator Goldwater, he was not a member of Congress at all in 1947. 93 Cong. Rec. 7489, 7538. Thus, their views in 1957 and 1959 would not provide a sound basis for interpretation of the 1947 statute contrary to its language and intent at the time of its enactment.

E. *The 1947 version of Section 302 was sufficiently definite and certain to be the basis of a criminal prosecution.*

In their motions to affirm, appellees offered an alternative contention that the 1947 version of Section 302 is too vague to be read as prohibiting a loan transaction. While the legislative draftsman might have chosen to use a number of words of specific content, rather than broad inclusive words like "pay", "deliver", and "receive", a statute does not become invalid because more specific phraseology is possible. All that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petril-*

lo, 332 U.S. 1, 8. So measured, the language of Section 302 gives fair notice, in well-understood terms, that no payment or delivery of money or other thing of value is permitted unless specifically exempted from the operation of the statute. The section does not require the appellees to make as difficult a choice as that involved in many cases under legislation already upheld by this Court.[11] What

[11] *E.g.*, *Roth* v. *United States*, 354 U.S. 476, 491 (statute forbidding the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character"); *United States* v. *Harriss*, 347 U.S. 612 (statute applicable to anyone who solicits or collects money where the "principal purpose" of the person or the principal purpose of the solicitation or collection is to influence legislation by direct communication with legislators); *United States* v. *Hood*, 343 U.S. 148, 151–152 (statute forbidding sale of influence to obtain "any appointive office or place" held to include appointive offices authorized by Congress but not yet established by the President); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (regulation requiring the drivers of trucks carrying explosives to avoid "congested" routes "so far as practicable, and, where feasible"); *Dennis* v. *United States*, 341 U.S. 494, 496 (statute forbidding any person to conspire "to knowingly or willfully advocate * * * or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence * * *"); *Kovacs* v. *Cooper*, 336 U.S. 77 (prohibition against "loud and raucous" sound trucks); *United States* v. *Petrillo*, 332 U.S. 1 (statute prohibiting coercion of radio stations to employ persons "in excess of the number of employees needed * * * to perform actual services"); *Screws* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97 (prohibition against depriving any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *Chaplinsky* v. *New Hampshire*, 315 U.S. 563 ("any offensive, derisive or annoying

was said in *United States* v. *Hood*, 343 U.S. 148, 151–152, has more than superficial applicability here:

> * * * The picture of the unsuspecting influence merchant, steering a careful course between violation of the statute on the one hand and obtaining money by false pretenses on the other by confining himself to the sale of nonexistent but plausible offices, entrapped by the dubieties of this statute, is not one to commend itself to reason.

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word"); *Gorin* v. *United States*, 312 U.S. 19 ("connected with" or "relating to" the national defense); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 (statute exempting fair trade agreements from operation of other laws only if the fair traded article was in "fair and open" competition with other products); *United States* v. *Wurzbach*, 280 U.S. 396 (no officer or employee of the United States may solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (pasturage of sheep forbidden if it would interfere with the "usual and customary" use of a cattle range); and *Nash* v. *United States*, 229 U.S. 373 (statute forbidding "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

Nothing in *United States* v. *Mersky*, 361 U.S. 431, is inconsistent with the government's position in this case. In *Mersky*, this Court held that a customs regulation, on its face, left "the distinct impression that it was intended to protect and expedite the collection of customs duties", rather than to change the requirements as to the markings to be affixed to imported goods after importation (*id.*, at 440–441). Here, there is no question but that Section 302 is directed at the regulation of financial dealings between employers and representatives, and thus gave full warning of the general area it covers.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 91.

UNITED STATES OF AMERICA,
Appellant,

v.

ROY FRUEHAUF, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. AND BROWN EQUIPMENT AND MANUFACTURING CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 91.

UNITED STATES OF AMERICA,

Appellant,

v.

ROY FRUEHAUF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. AND BROWN EQUIPMENT AND MANUFACTURING CO.

Statement.

The appellant's descriptions of the "Opinion Below," "Jurisdiction," "Question Presented" and "Statutes Involved" (Br., pp. 1-3) are substantially adequate.

The appellant's references, in its statement and elsewhere (Br., p. 16), to the circumstances and details of the loan, however, are irrelevant and improper. In the first place, the Notice of Appeal and the Jurisdictional Statement herein limit the question on the appeal to whether a concededly genuine, or *bona fide*, loan is "within the proscriptions of Section 302 (a) and (b) of the Labor-Man-

agement Relations Act" (R. 48; Jurisdictional Statement, p. 2). Secondly, any other question or any other facts are outside the scope of this appeal, since this Court, in reviewing a decision which "the District Court has rested • • • upon the construction of the underlying statute • • • is not at liberty to go beyond the question of the correctness of that construction." *United States* v. *Hvass*, 355 U. S. 570, 574; see also: Revised Rules of the United States Supreme Court, Rule 40.[1]

Summary of Argument.

In the interest of clarity, we have separated our argument into two points (although they both lead to the same conclusion): (1) the statute as it existed at the time of the transaction in question (1954) did not prohibit a loan, and (2) the subsequent amendment thereto in 1959, adding the word "lend," clearly confirmed Congress' understanding that a loan had not previously been prohibited.

I.

A. The verbs "pay or deliver," as used in Section 302 (a), do not fairly connote or include a loan. They would

[1] The Government's extraneous references are not only irrelevant but are particularly inappropriate, since the instant loan was repaid in full with interest long before any investigation was begun and years before the indictment was filed (R. 13, 6). Indeed, the McClellan Committee investigation disclosed that the loan was not motivated by the desire for any labor benefit or advantage, but was made solely as an act of personal gratitude for a previous, larger loan to appellee Fruehauf by the union of which Beck was president—a loan made openly and publicly (as the union had made to others with its surplus funds), for entirely legitimate business reasons, and repaid in full with interest. (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7 at 2197-2211). The motivation here was actually akin to the type of personal relationship which Judge Hand, in *United States* v. *Ryan*, 225 F. 2d 417, 427, expressly distinguished from "the prospect of possible benefits to come."

not be so understood in ordinary, every-day usage and, *a fortiori,* should not be so construed when used in a criminal statute. Where Congress, in framing similar, contemporaneous statutes, desired to proscribe loans as well as gifts and payments, it uniformly included the words "loan" or "lend," and had it intended loans to be covered by Section 302 (a), it would certainly have expressly so provided.

B. Section 302 (a) creates an entirely new crime, which is merely *malum prohibitum.* At best, its application to loans is ambiguous and equivocal, so that, under the most fundamental canons of criminal statutory construction, the more restricted alternative must be adopted. A contrary construction would deprive defendants of the fair and unequivocal warning to which they were entitled.

C. Analysis of the statute and all the decisions clearly negatives any such all-encompassing (and unexpressed) purpose or policy as appellant postulates. Certainly Congress did not prohibit every act by an employer which "tends to engender . . . gratitude in the representative" (see Br., p. 16). The failure to include loans in the five "exemptions" in Section 302 (c) is meaningless, since all of those exemptions pertain to simple "payments" which, if they had not been exempted, would have been clearly included in Section 302 (a). Appellant's authorities either gave the statute a restrictive construction, against the Government, or held that such a construction would "reduce the statute to a practical nullity"—which is clearly not the case here.

D. The history of the statute discloses that its purpose was not broad but narrow, and the statements of its proponents suggest restrictive criteria, rather than the all-encompassing ones postulated by the appellant. The statements quoted by appellant are torn out of context

and they were all directed toward what was generally acknowledged to be the primary (although not the sole) purpose of the statute, namely, the regulation of union welfare funds. What is significant is that in all of the volumes of detailed Congressional debate and Committee hearings on this statute, and despite the many, specific consequences which its opponents admonished Congress would flow from the bill, no one even mentioned its possible interdiction of loans.

II.

The 1959 amendment to Section 302 of the Labor-Management Relations Act of 1947 added the word "lend" to the prohibitions of Section 302 (a), thereby making it a crime for an employer to "pay, *lend* or deliver" money or other thing of value to a representative of his employees.

The amendment demonstrates Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan. The legislative history of the amendment shows that the respective House and Senate Committees, the sponsors of bills containing the amendment, labor-relations experts, and the leading labor spokesman all shared the view that the amendment added a prohibition against loans by employers to labor representatives which was not included in the original act.

Where a statute, particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the act thus specified was not theretofore unlawful. *Viereck* v. *United States,* 318 U. S. 236; *United States* v. *Chase,* 135 U. S. 255.

ARGUMENT.

POINT I.

Section 302(a) of the Labor-Management Relations Act (1947) did not proscribe a loan by an employer to a labor representative.

A. The words "pay or deliver" do not fairly connote a loan.

The words "pay or deliver any money or other thing of value," as used in Section 302 (a) of the Labor-Management Relations Act of 1947, do not reasonably include the making of a loan. Webster's New International Dictionary (in substantially the same language as Funk & Wagnall and all of the other dictionaries) defines "pay" as:

> "2. To satisfy (one) for service rendered; property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; • • • 3. To give in return for services, purchases, etc., in satisfaction of a promise, a moral debt, • • • or in retribution (that which is due) • • • 4. To make compensation or retaliation for • • •; to make up for • • •; to recompense • • • 5. To give, offer or make, freely or as fitting • • •."

It defines "deliver" as (*inter alia*) "To give or transfer; to yield possession or control of; to part with; to make or hand over." The synonym given for "deliver" is "release," and none of the many synonyms given for "pay" in any dictionary includes "lend." The mere assertion that a loan of money can be a "thing of value" is irrelevant; the point is that the verbs "pay" and "deliver" do not include "lend."

It is universally recognized that "the word 'pay' indicates the discharge of an obligation rather than an investment of money." *Hopson* v. *The Aetna Axle & Spring Co.*, 50 Conn. 597, 601. A loan, like an investment, is "made," not "paid."

From the enactment of the Labor-Management Relations Act of 1947 until the date of the indictment, and indeed until the present time, the only other decision relating to the coverage of a loan of money by Section 302 is *United Garment Workers* v. *Jacob Reed's Sons*, 83 F. Supp. 49 (E. D. Pa.). It was there held that, "The term 'payment' used in this section [Sec. 302(c)] does not mean a loan" (83 F. Supp. at 52).

Nor would anyone ordinarily describe the making of a loan as a "delivery." See, *Western Union* v. *Lenroot*, 323 U. S. 490, 505-06, where this Court held that, even in a non-criminal statute, the construction of such common verbs must be limited to their ordinary, "marketplace" usage, even though "linguists and scholars" might ascribe a broader meaning to them.

In support of its contention that "delivery" encompasses the making of a loan, the appellant (Br., p. 13) urges that, "Every loan contemplates a transfer, delivery, or acceptance of something having specific identity." That contention—even apart from the strained use of the word "deliver"—is inaccurate, since a great many loans consist merely of the creation of a bank credit, not involving any "delivery" to the borrower at all—or, *a fortiori*, the delivery of "something having specific identity." Certainly, Congress, in using the word "delivery," did not have in mind such creations of credit, or, as appellant argues, "every loan."

In any event, it should not be assumed that Congress used these simple words "pay" and "deliver" loosely or

ambiguously. As this Court held in *Bell* v. *United States*, 349 U. S. 81, 83:

> "About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what is desired to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit."

Had Congress intended to proscribe loans, it could easily, and should, have expressly done so—as it did twelve years later. Thus, when it defined the terms "contribution" and "expenditure," within the restrictive sections of the criminal statute pertaining to "Elections and Political Activities" (18 U. S. C. 591-612), Congress was not content with the words "gift" and "payment," but expressly included the word "loan" in both definitions (18 U. S. C. 591). Significantly, both definitions also contained the phrase—virtually identical with that in the instant statute—"money, or anything of value," but that did not obviate the necessity of specifying a "loan".

Similarly, when Congress, in the Federal Corrupt Practices Act [2 U. S. C. 241(d) and (e)], prohibited certain election contributions by national banks and other federal corporations, it expressly defined the term "contribution" to include a "loan," as well as a "gift." Here again, Congress used the same phrase "money, or anything of value," but again did not rest thereon.

Again, in proscribing financial benefits by bank officers to examiners, Congress expressly included a "loan" (18 U. S. C. 217). Both this statute and 18 U. S. C. 591, above cited, were enacted in 1948, only one year after the Labor-Management Relations Act. This renders all the more significant Congress' omission from Section 302 of any reference to loans whatsoever, until twelve years later, in 1959.

B. The District Court properly rejected a construction of the statute which would have deprived the accused of an unequivocal warning.

Any doubt as to the meaning of Section 302 (a) is resolved by the canons of construction applicable to criminal statutes. It is elementary that, "In the construction of a penal statute, all reasonable doubts concerning its meaning ought to operate in favor of the accused. *Harrison* v. *Vose*, 9 How. 372, 378." *North American Van Lines* v. *United States*, 243 F. 2d 693, 696 (C. A. 6), citing, *inter alia*, *United States* v. *Resnick*, 299 U. S. 207 and *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284.

McBoyle v. *United States*, 283 U. S. 25, 27 (Holmes, J.) held that an airplane was not a "motor vehicle • • • or any other self-propelled vehicle not designed for running on rails," within the meaning of a statute penalizing the transportation of stolen vehicles. In unanimously reversing a judgment of conviction, this Court indicated that even in the case of a criminal who, "it is not likely • • • will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given • • • in language that the common world will understand," and that "the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies. . . " How much more strongly do these principles apply to the instant attempt to extend the statute, on grounds of "similar policy," to these defendants, who certainly would not have made the loan if they had been fairly notified, or had even suspected, that such conduct was criminal.

Prior to the enactment of Section 302 (a), it was not a crime for an employer to pay or deliver any money or other thing of value to a representative of his employees,

and the crime which it created was solely *malum prohibitum*. *United States* v. *Ryan*, 350 U. S. 299, 305; *Brennan* v. *United States*, 240 F. 2d 253 (C. A. 8), *cert. den.*, 353 U. S. 931. Consequently, that statute must be construed in accordance with the requirement that it give the employer a clear and unequivocal warning, in language which the ordinary layman will understand, of precisely what acts are rendered criminal and will result in the deprivation of his liberty or property and his reputation.

As this Court succinctly held in *Connally* v. *General Construction Co.*, 269 U. S. 385:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. • • • 269 U. S. at 391.
>
> " 'The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. • • • Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning' • • •." 269 U. S. at 393.

Even if Section 302 (a) does not, as we contend, clearly exclude loans, unquestionably it does, at best, "admit of a double meaning," in which "the dividing line between what is lawful and unlawful" is not clear. Consequently:

> "[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some

ambiguous implication." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222.

Among the numerous other authorities to the same effect are: *Bell* v. *United States*, 349 U. S. 81 (*supra*); *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *McNinch*, 356 U. S. 595; *Iselin* v. *United States*, 270 U. S. 245; Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 765-66, and cases cited therein.[2]

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[2] Appellant (Br., pp. 36-38) misconstrues this entire argument as one addressed to the constitutionality of Section 302 (a), and all of its authorities involve primarily questions of constitutionality, rather than statutory construction (ftn. 11). It is, however, unnecessary for this Court, in order to affirm the fairer and clearer interpretation of the statute given by the District Court, to hold that a contrary interpretation would be unconstitutional.

In addition, every one of the appellant's authorities is distinguishable on the ground that the statutory language involved was, wholly unlike Section 302 (a), either clear or not susceptible of further clarification. As was held in appellant's leading authority of *United States* v. *Petrillo:* "But none [no more precise language] occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose" (p. 7). In the instant statute Congress, had it so intended, needed merely to add the word "lend".

Further, in *Dennis* v. *United States*, *Screws* v. *United States* and *Williams* v. *United States*, *Gorin* v. *United States* and *Boyce Motor Lines* v. *United States*, the crime defined by the statute expressly required a specific or general criminal intent (*e. g.*, as this Court held in *Screws*, "specific intent," pp. 103-04; in *Boyce Motor Lines*, "culpable intent," p. 342; and in *Dennis*, an offense against "moral standards"—183 F. 2d 201, 215, affirmed 341 U. S. 494). All of those decisions held that under such circumstances the doctrine of fair warning is not controlling, since, "a mind intent upon wilful evasion is inconsistent with surprised innocence". *United States* v. *Ragen*, 314 U. S. 513. In the instant case there is no requirement of intent whatsoever, so that an interpretation which gives a clear warning is imperative.

In addition, *Chaplinsky* v. *New Hampshire*, *Omaechevarria* v. *Idaho*, and *Kovacs* v. *Cooper* involved not federal but state statutes, in which the construction determined by the highest state court is binding on this Court, and the only permissible review is of constitutionality. *Old Dearborn Co.* v. *Seagram Corp.* involved a civil and not a criminal statute, so that it is completely inapplicable. *Williams* v. *United States*, *Screws* v. *United States* and *United States*

The legislative history of the 1959 amendment (Point II, *infra*) shows that Congress itself thought that loans were not proscribed by Section 302 as originally enacted. If Congress so believed—or *even if it was not clear*—surely a layman, like these appellees, could not have clearly understood, and therefore was not given fair and unequivocal warning, that the statute prohibited loans.

C. The appellant's attempt to enlarge the statutory prohibition by its evaluation of the underlying policy is untenable and contrary to its own authorities.

The appellant's argument (Br., p. 16) that the "purpose" of the original Section 302 requires that it be construed to include a loan, since a loan "tends to engender the very same emotion—gratitude—in the representative," is untenable and irrelevant.

Congress evidently believed that a loan to a labor representative, which he intended to and did repay, did not have the same potential consequences as a gift. Certainly, the exclusion of loans from the statutory prohibition would not "reduce the legislation to a practical nullity," within the rationale of the appellant's authority of *United States* v. *Ryan*, 350 U. S. 299, 306.

Appellant's reliance (Br., pp. 17-18) upon the fact that Congress did not include loans in any of the five "exemptions" provided in Section 302 (c) is clearly erroneous; at best, it begs the entire question. All of the transactions described in these exemptions would have been pro-

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v. *Harriss* are essentially adverse to the appellant, since this Court there expressly adopted a "close construction," on the ground that "it would save an act from vagueness that is fatal." (341 U. S. at 101)

hibited by the express language of Section 302 (a) if they had not been excepted; all of them were, incontrovertibly, payments of money. On the other hand, it was unnecessary for Congress to exempt loans, for the very reason that they did not constitute payments or delivery of money or other thing of value.

Arroyo v. *United States*, 359 U. S. 419, also relied on by appellant (Br., pp. 6, 13, 14), actually gave Section 302 (a) a restrictive, rather than a broad, interpretation. The Court pointed out:

> "We construe a criminal statute. 'It is the legislature, not the Court, which is to define a crime, and ordain its punishment'." 359 U. S. at 424.

The language of Mr. Justice Holmes there quoted (Br., p. 13) confirms that criminal laws will be sensibly construed "as saying what they obviously mean." It cannot be seriously contended that Section 302 "obviously means" loans.

This Court's language in *United States* v. *Ryan*, 350 U. S. 299, *supra*, is quoted out of context (Br., pp. 14, 15). It was there merely decided that "the president and principal negotiator of a labor union [who had received several outright and egregious gifts from the employer] [was] a 'representative' of employees within the meaning of §302 (b)" (p. 300). The Court expressly based its interpretation upon three factors: (1) that it was required by the "literal meaning" of the words (p. 302); (2) that it was supported by the "legislative history" of the statute (p. 305); and (3) that any other interpretation, limiting the proscribed payments to those made to the union itself, would "reduce the legislation to a practical nullity" (p. 306, *supra*). *None* of these factors applies here.

Moreover, the argument of presumed Congressional policy must yield to the far clearer judicial policy of fair warning to the accused (*supra*, subdivision B). In most of the cases hereinabove cited in our subdivision B, the statutory language was no less "broad" than Section 302, and the Government also contended that the underlying policy of Congress was in jeopardy. Nevertheless, as this Court held in *United States* v. *Cardiff*, 344 U. S. 174:

> "The Department of Justice urges * * * that that construction is needed if the Act is to have real sanctions and if the benign purposes of the Act are to be realized.
>
> * * *
>
> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula" (pp. 175-76).

Consequently, it would be immaterial even if Congress' omission of the word "loan" were attributable to "inadvertence." See, *Iselin* v. *United States*, 270 U. S. 245, 251, *supra*.

D. Appellant's resume of "the legislative history of Section 302" is misleading; that history actually discloses a narrow purpose, which should not be enlarged to include loans.

Appellant devotes almost ten pages of its brief (pp. 7-8; 18-26) to its argument that the legislative history of Section 302 shows an all-encompassing purpose "to prohibit all financial dealings," whereas, in fact, it discloses a specific, relatively narrow subject of concern. While quoting sporadically from statements of various Senators—

none of whom referred to loans in any way—appellant omits the cardinal fact which was emphasized by every one of them:

The Byrd amendment to the Case Bill which, as appellant acknowledges (Br., p. 18), was the forerunner of Section 302, was introduced solely to counteract a demand by the United Mine Workers "that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined." *United States* v. *Ryan*, 350 U. S. 299, 304-05, *supra*. All of the debates in both Congressional sessions referred to by appellant revolve about the central purpose of regulating union welfare funds, so that the resulting statute must be read in that context. Appellees do not dispute the appellant's statement, quoting *United States* v. *Ryan*, that "Congress was [not] aiming solely at the welfare fund problem" (Br., p. 25). However, it is abundantly clear that Congress was aiming primarily at that problem. This in itself provides restrictive criteria of construction and militates against the all-embracing interpretation invoked by the appellant (*e. g.*, Br., pp. 16-18).

As illustrative, Senator Byrd, the proponent of the amendment, stated:

> "It [the amendment] has a specific purpose, which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions" (93 Cong. Rec. 4678).

To precisely the same effect, see the remarks of Senator Byrd at the prior session, 92 Cong. Rec. 4891 (Br., p. 19).

Similarly, Senator Taft, after having reiterated that "[t]he occasion of the amendment was the demand by the United Mine Workers of America," stated:

> "The purpose of the amendment is to require that the fund shall be established in definite detailed form. • • • The purpose is to prevent the abuse of welfare funds" (93 Cong. Rec. 4746-47; to same effect, 1947 Senate Committee Hearings, 52-53).

Senator Ball, the other proponent quoted by the appellant (*e. g.*, Br., pp. 23-25), said:

> "Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds • • •" (93 Cong. Rec. 4678).

Not a single sentence in the lengthy deliberations of either House or of their Committees intimates that Congress intended to proscribe loans. Indeed, the very excerpts which appellant has selected, when restored to their context, confirm the narrow primary purpose above indicated. Thus, appellant's first reference—to 92 Cong. Rec. 4893 (Br., p. 16)—which consists of a statement by Senator Byrd, is preceded by that Senator's declaratior that:

> "The amendment is for the purpose of prohibiting the payment of royalties to labor unions, which is the issue in dispute between the coal miners and the coal operators" (p. 4891).

Appellant's next reference (Br., p. 16), 93 Cong. Rec. 4678, is to a statement by Senator Ball, who clearly pointed out: "there is very grave danger that the [welfare] funds will be used for the personal gain of union leaders • • •" (*ibid.*). This observation was directed to the practice of using union welfare funds to buy health insurance policies, the commissions for which were paid to union leaders. Similarly, the language of Senator Byrd quoted by the

appellant (Br., p. 19) was immediately followed by that Senator's statement: "My amendment would prevent an employer from paying a royalty to the representative of a union * * *."

The "modifications" of the Byrd amendment referred to by the appellant (Br., p. 20)—most of which refer, again, to welfare funds—are entirely irrelevant here. Their only significance lies in their indication of the care and concern for detail manifested in this legislation—which precludes the inference that Congress, although silent with regard to loans, actually intended to prohibit them.

The quoted statements of Senators Taft, Tunnell and Pepper (Br., pp. 20-21) were all made in the context of welfare fund regulation. It is true that Senator Pepper, as the foremost opponent of the Byrd amendment, sought to admonish Congress that the consequences of the bill might transcend its purpose. However, the consequences depicted by him pertain, for the most part, to quasi-welfare activities—"baseball teams, dances and picnics" and "recreation funds" (Br., pp. 20, 22), and "improving housing conditions and providing playgrounds" (92 Cong. Rec. 5499, following shortly after the appellant's quotation at page 21)—not having the slightest resemblance to loans to union representatives.

Furthermore, as Senator Taft, the Committee Chairman, stated (to quote from appellant's own paraphrase at Br., p. 23), "the specific contributions referred to [by Senator Pepper] were already forbidden as an unfair labor practice." Since loans to a labor representative had never been previously forbidden, Senator Taft confirmed the fact that Senator Pepper was referring to payments of a wholly different character.

Appellant's brief omits from the second quoted reply of Chairman Taft (Br., p. 23), the balance of his statement, which is to the effect that:

> "the principal purpose • • • of the Byrd amendment [was] to see that if an agreement [for a welfare fund] was reached, it was properly limited and that the fund would not be turned over to some union leader with complete discretion • • •" (1947 Senate Committee Hearings, p. 53).

Again, in quoting from the testimony of William Green, appellant (Br., p. 24) omits Mr. Green's first sentence, which was as follows:

> "Section 201 of • • • S.55 apparently is an attempt to prevent bribery of union officials and to restrict *and regulate the establishment of so-called welfare funds.*" (Emphasis supplied).

Not only was Mr. Green's criticism of the bill completely silent regarding loans, but it is clear from the context that his concern about the prohibition against "bribery" related to the potential regulation of "checkoff" arrangements. Mr. Joseph Beirne, another labor leader whose testimony is fragmentarily quoted by appellant (p. 24), made it clear that he was referring to "a kickback or anything like that." Appellant (Br., p. 25), in referring to the portion of Senate Reports 105, 80th Congress, which became Section 302, omits any mention of its title, "3. Limitation on Abuse of Welfare Funds."

Finally, the remark attributed by appellant (Br., p. 25) to "opponents of the section" was not a statement but merely a question asked by Senator Ives. Moreover, even that question—which, like most of the arguments of the

opposing Senators, warned of remote potential consequences of the bill—was completely silent with regard to loans. That, indeed, is one of the most significant facts in these debates, since if any Congressman had thought that loans were within the prohibition of the statute, he would certainly have questioned or commented thereon.

Consequently, Section 302 (a) did not proscribe loans, either under its language, its purpose or its history. Moreover, any contrary interpretation of it would violate the requirement of fair and unequivocal warning.

POINT II.

The 1959 amendment of Section 302(a), by expressly adding the word "lend" to the acts proscribed, evidences Congress' own understanding that the statutory prohibition had not theretofore encompassed a loan. The history of this amendment clearly indicates that the word "lend" was intended to add another proscribed act.

While it is clear from the foregoing discussion that Section 302, as it stood at the time of the offense charged, did not cover loans, any doubt which might have existed has been laid to rest by the 1959 amendment of this section, which added, *inter alia*, the word "lend" to the prohibited acts.

The Act, as amended, reads in pertinent part as follows:

> "Section 302(a). It shall be unlawful for any employer or any person who acts as a labor relations expert, adviser or consultant to an employer to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver,

any money or other thing of value * * *." (Emphasis supplied)

The Congressional proceedings which preceded and accompanied the amendment of Section 302 in 1959 establish that Congress recognized that the 1947 Act did not cover loans, and that the prohibition thereof was one of the express purposes of the amendment.

The 1959 amendments to the Taft-Hartley Act, in large measure, grew out of the findings of the Senate Select Committee on Improper Activities in the Labor-Management Field (the "McClellan Committee"). Thus, Section 2(b) of the preamble to the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U. S. C. 401(b), states that:

> "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."

The Report of the Senate on the Act (No. 187, 86th Cong., 1st Sess.) states (p. 2):

> "The committee reported bill is primarily designed to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management Field for the past several years."

The Report of the Subcommittee on Labor of the House Committee on Education and Labor on the same legislation (No. 741, 86th Cong., 1st Sess.) sets forth the purpose of the Act in virtually identical language.

Among the disclosures made to the McClellan Committee in the course of its hearings were several instances in which employers had loaned money to representatives of their employees. Thus, the loan involved in the instant indictment was the subject of testimony in hearings before the McClellan Committee (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2201-29). Also, loans by officials of a baking and candy company in Zion, Illinois to James G. Cross, President of the Bakery and Confectionery Workers Union, the union which represented their employees were found to have been made. (*Id.*, Part 8, at 2857-60, 3010-12). And James Hoffa, of the Teamsters Union was found to have borrowed money from employers of teamsters either directly or through labor relations advisers to such employers (*Id.*, Part 13, at 5267). Consequently, Congress, through the investigation which led to the amendment, became fully apprised of the existence of loans by employers or their agents to representatives of their employees and the appellant's contention (Br., p. 28) that the only purpose of the amendment of Section 302 was to extend its prohibitions to so-called "middlemen", that is, hired labor-management relations advisers or consultants, is wholly without foundation.

That Congress in 1959 was vitally interested in prohibiting loans by employers directly to employee representatives is clear from the fact that every comprehensive labor reform bill that was introduced at the session of Congress at which the amendment to Section 302 was passed (86th Cong., 1st Sess.) added an express prohibition against such

loans, with the exception only of the administration bill (S. 748, H. R. 3540) which was not reported out of committee. S. 505, Section 112 (Kennedy-Ervin Bill); S. 1555, Section 211 (Kennedy-Ervin Bill with Senate Committee amendments); H. R. 8400, Section 502 (Landrum Bill); H. R. 8401, Section 505 (Griffin Bill); H. R. 8432, Section 505 (Elliott or House Committee Bill); H. R. 8490, Section 505 each added the word "lend" to the prohibited acts of Section 302. H. R. 4473, Section 213; H. R. 7265, Section 307(b); S. 1137, Section 408(b) (McClellan Bill) contained prohibitions against such loans in separate sections devoted solely to that purpose. Thus, each member of Congress who saw fit to originate a proposal in this area felt that the inclusion of the prohibition against loans by employers to labor representatives was an essential element of new legislation.

The person most intimately connected with the labor reform legislation enacted by the 86th Congress was Senator Kennedy. He had served as a member of the McClellan Committee and was the co-author of the entire Labor-Management Reporting and Disclosure Act of 1959, which survived the legislative process in large measure without material change except in the form of additions (S. 505, S. 1555). He was its proponent on the floor and the manager of the bill during its passage through the Senate. He was chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, which considered and reported on the proposed legislation, and was a member of the conference committee which harmonized the House and Senate versions.

Senator Kennedy stated at the time of the introduction of S. 505, the so-called Labor-Management Reform Bill of 1959, which contained the amendment to Section 302, that one of the effects of the proposed legislation was that:

> "Sixth. The Becks and Hoffas will find future collusion with employers vastly restricted—with *no more loans* from employer groups, no more attacks on rival unions through middlemen like Nathan Shefferman, and no more secrecy shrouding the use of union funds to bail out a collaborating employer." (105 Cong. Rec. 885; emphasis supplied)

In that statement Senator Kennedy was expressing the same view he had held during the McClellan Committee hearings when commenting on the very transaction here involved. After describing in detail the acts for which the appellees here have been indicted, he advised the Committee:

> "*While there is no law against it*, I think the committee should take cognizance of the attitude that they took before this committee and recognize that they have a responsibility as well as rights in this matter." (Hearings before the Senate Select Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess., Part 7, at 2403-3; emphasis supplied)

During the hearings before the House and Senate Committees, similar views were expressed by witnesses who appeared before them. Senator Goldwater, a member of both the McClellan Committee and Subcommittee on Labor of the Senate Labor and Public Welfare Committee, stated in testimony before the Joint Subcommittee of the House Education and Labor Committee:

> "The Taft-Hartley Act prohibits certain types of payments by employers to labor unions or their agents as tending to corrupt or wrongfully influence them. Following this lead the bill *adds a prohibition on any loan as well.*" (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st

Sess., on H. R. 3450, etc., Part 4, at 1627; emphasis supplied)

The President of the A. F. of L.-C. I. O., George Meany, expressed the same opinion to the House Committee:

> "Both these bills contain, in Section 107, provisions restricting loans from unions to their officers or employees, *and barring loans from employers to officers or employees of unions representing the particular employer's employees.* These provisions seem to us sound and desirable." (Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess., on H. R. 3450, etc., at 103; emphasis supplied)

The reports on the amendatory legislation of both the House and Senate Labor Committees are in accord that a purpose of the amendatory legislation was to close the existing loopholes with respect to loans. The Senate Report states:

> "Although these provisions of existing law would punish most forms of bribery or extortion if they were vigorously enforced by prosecuting officers, the testimony before the McClellan committee revealed loopholes which both employer representatives and union officials turned to advantage at the expense of employees. The Committee bill proposes to close the loopholes * * *." (S. Rep. No. 187, 86th Cong., 1st Sess., p. 13.)

The use of the word "loopholes" in the plural refutes appellant's contention that only "middlemen" were being dealt with by the amendment and that this was the only "'loophole' intended to be closed." (Br., pp. 28, 30.)

Further, conclusive refutation is supplied by the entire legislative record. Certainly, the acknowledgment in appellant's Jurisdictional Statement (p. 10, reiterated in its Brief in Opposition to Motion to Affirm, p. 6), that "there is some material in the legislative history of the 1959 Act that points in the other direction," (i.e., that the amendment proscribed loans for the first time), is a gross understatement.

The House Report (No. 741, 86th Cong., 1st Sess.) contains at page 46 the following description of the proposed amendment:

> "Under existing law it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c) of section 302. The purpose of these amendments to section 302 is to forbid any payment, *loan*, or bribe by an employer, employer association, or anyone acting on an employer's behalf, i.e., labor relations consultant. The demand or acceptance of such payment, *loan*, or bribe is also proscribed." (Emphasis supplied)

Similar statements on the floor of both Houses during the course of debate on the legislation indicate that the amendment was understood by all of the members to proscribe employer loans for the first time. In addition to his statement on introducing the legislation, Senator Kennedy, just after the passage of the so-called Kennedy-Ervin Bill (S. 1555) by a 90 to 1 vote (105 Cong. Rec. 6745), stated:

> ". . . The basic provisions of the Kennedy-Ervin bill as it passed the Senate include the following . . .
> "Fifteenth. It prohibits loans by employers or unions to union officers" (105 Cong. Rec. 7021-2).

The proponent of the bill reported by the House Committee (H. R. 8342) was Representative Elliott, a member

of the House Committee on Education and Labor. In a speech on the floor delivered in his behalf, he stated of the amendment to Section 302 by Section 505 of the bill:

> "This section, 505, *adds* to the existing proscription of section 302(a) the prohibition that the *employer* or his labor relations expert or consultant not pay *or lend*, or agree to pay *or lend* anything of value 'to any labor organization or any officer or employee thereof' which represents, seeks to represent, or would admit to membership any of [sic] employees of such employer; . . ." (105 Cong. Rec. 15550; emphasis supplied).

Robert F. Kennedy, Chief Counsel to the McClellan Committee, one of the men most familiar with the requirements for new legislation and author of a book reviewing the results of the investigation, *The Enemy Within* (Harper Bros. 1959), placed before the House of Representatives his views on the need for new restrictions in a letter sent to each member and read to the House during debate by Representative Metcalf. The letter, in pertinent part, read as follows:

> "Dear Congressman:
>
> I received your inquiry in regard to my opinion of the various labor bills before the House of Representatives. I think it is appropriate, of course, that I limit my views to relating how the various bills match the findings and recommendations of the select committee.
>
> Based upon those investigations and findings, my conviction has been that any bill, to be effective, must include:
>
> • • • •
>
> 3. Safeguards against secret conflict of interest transactions by, or loans to, union officers. . . .

> In my opinion, the bill that passed the Senate would effectively write these provisions into law, as would the Elliott bill in a comparable form—thus carrying out all the recommendations of the McClellan committee. . . .
>
> Sincerely yours,
>
> ROBERT F. KENNEDY,
> *Chief Counsel"*

(105 Cong. Rec. 15687)

Senator Goldwater, who opposed the Senate Bill because he thought it was not strong enough (105 Cong. Rec. 6742, 6745), nevertheless agreed that the amendment to Section 302 did add a prohibition against employer loans. He said:

> "Section 302, as it presently reads, prohibits any such payment or delivery of money or other thing of value. This section adds a prohibition on any loan as well." (105 Cong. Rec. 10099)

Thus the principal proponents of the amendment (Senator Kennedy and Representative Elliott), the Chief Counsel to the McClellan Committee (Mr. Kennedy), a leading representative of labor (Mr. Meany), as well as the respective committees of each House, and Senator Goldwater, who voted against the Senate Bill, all concurred in the view that the amendment expanded the statute to prohibit loans by employers, either directly or indirectly, to labor organizations or officers or representatives thereof.

To this is added the fact that although 163 members of Congress were members both when the amendment to Section 302 was passed, in 1959, and when the original section was enacted in 1947, not one of them even intimated that Congress had intended in 1947 to make Section 302 applicable to loans (compiled from *Congressional Directory*, 86th Cong. 1st Sess., January, 1959).

In response to the overwhelming evidence of legislative intent to add a proscription of employer loans where none existed before, the appellant argues that the purpose of the amendment to Section 302 was solely to extend its application to "middlemen" (Br., pp. 28-36). However, the legislative history above reviewed amply demonstrates that Congress was also very much concerned with the problem of employer loans directly to labor representatives, and that the view of every one intimately connected with the legislation was that a proscription was being added against such activities.

Furthermore, subdivision (b) of Section 2 of the Labor-Management Reporting and Disclosure Act of 1959, which consists of a "Declaration of Findings, Purposes and Policy," speaks as to the need for additional legislation with respect to "labor organizations, *employers*, labor relation consultants and their officers and representatives" (emphasis supplied). This of itself clearly indicates that Congress was concerned with the activities of employers per se since they and "middlemen" (labor relations consultants) are mentioned separately.

The added word "lend" is no less novel than the added phrase "labor relations expert, adviser or consultant to an employer" ("middleman"), which the appellant concedes was a substantive addition (Br., pp. 27-32). Indeed, the latter phrase could more readily be construed as within the meaning of the term "employer" than can "lend" be construed as "pay or deliver." This is particularly true since the word "employer" has been held to include "any person acting as an agent of an employer, directly or indirectly" (*United States* v. *Lavery*, 161 F. Supp. 283, 286 (M. D. Pa.); *United States* v. *Ryan*, 128 F. Supp. 128, 131 (S. D. N. Y.).

Appellant's contention that Congress believed that loans were proscribed by the original language has no substantiation whatever, and is based solely upon a strained interpretation of language torn from its context. The excerpt quoted and emphasized by appellant (Br., p. 29) from the Senate Report on the Kennedy-Ervin Bill as amended, reads:

> "Section 302 already prohibits any payment by an employer to any representative of his employees" (S. Rep. No. 187, 86th Cong., 1st Sess., p. 11).

No one, of course, disputes that Section 302 as originally enacted proscribed "payments." However, for all of the reasons set forth in Point I hereinabove, the word "payment" cannot be construed as encompassing loans, and none of the language quoted by appellant contains any indication to the contrary.

Far more significant in this identical Report is the statement that "the testimony before the McClellan Committee revealed loopholes • • • The Committee bill proposes to close the loopholes" (*supra*, p. 23). Precisely applicable, therefore, is the recent decision of *Fischer Flouring Mills Co.* v. *United States*, 270 F. 2d 27 (C. A. 9), holding:

> "It is hornbook law that, where Congress has amended a statute to cover a 'loophole' the fact that an addition has been required is proof that the prior statute should be given a different construction." (270 F. 2d at 28)

The apparently universal view that the addition of the words "lend" and "loan" to Section 302 substantively changed the statute so as to add a proscription where none existed before has been succinctly expressed in Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 892 (1960):

> "It adds loans and agreements to lend to the types of payments already prohibited. It also adds the following to the list of recipients who may not receive such payments or loans. * * *".

Mr. Aaron further observes, at pages 892-93:

> "The amended law will outlaw bona fide loans, openly made, by some employers to their employees. This is unfortunate, but scarcely a weighty argument against commendable objectives of the amendment."

This Court has consistently held that where a statute, and particularly a criminal statute, is amended so as to include an additional specification of the crime, the amendment is in effect a legislative declaration that the new specification was not theretofore unlawful.

In *United States* v. *Chase*, 135 U. S. 255, the defendant had been indicted for mailing an indecent letter under a statute which proscribed the mailing of a "book, pamphlet, picture, paper, writing, print or other publication of an indecent character." After the indictment was filed, the statute was amended to add "letters" to the list of prohibited matter. The United States contended that the term "writing" included letters. The Supreme Court, in ruling that the statute had not been violated, stated:

> "If letters were embraced in the statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that body did not put the construction on the prior statute claimed in behalf of the United States, else we have it doing a useless and vain act" (p. 262).

Similarly, in *Viereck* v. *United States*, 318 U. S. 236, a statute requiring the disclosure of propagandists' activities

for foreign governments was amended after the acts for which defendant was indicted had occurred, so as expressly to proscribe the type of act for which Viereck was indicted. The Government argued (pp. 245, 247), precisely as it does here, that (1) the amendment was merely for the purpose of clarification, (2) to construe the original statute otherwise would have rendered it a "half-way measure," and (3) the Congressional Committee reports contained "no mention of the explicit restriction of the application of * * * the old Act" (in the instant case they do). Nevertheless, this Court, in reversing the Court of Appeals for the District of Columbia, held that the amendment extended the old statute and that the application, *ex post facto*, of the new was "not to be justified by denominating the amendment as clarifying or declaratory legislation" (p. 247).

See also: *United States* v. *Curtis*, 107 U. S. 671; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Weitzel*, 246 U. S. 533.

None of the decisions cited by the appellant (Br., p. 35) impairs, in the slightest degree, the effect of these authorities. They are either wholly inapplicable or materially distinguishable.

In *Rainwater* v. *United States*, 356 U. S. 590, the defendant had been sued under the civil provisions of the False Claims Act for making a false claim against the Commodity Credit Corporation, a wholly owned government corporation. The original False Claims Act proscribed the making of false claims "against the Government of the United States, or any department or officer thereof". Subsequently this provision was amended to include "any corporation in which the United States of America is a stockholder." The legislative history indicated that the amendment was intended to encompass certain corporations chartered under local law in which both

the government and private persons jointly held stock; *e.g.*, United States Shipping Board Emergency Fleet Corporation. Rainwater contended that the amendment showed that the original act did not apply to any government corporation. The Court rejected this contention pointing out that the Commodity Credit Corporation was a wholly owned instrumentality of the government and that in enacting the amendment Congress was concerned with a separate and distinct issue, *i.e.*, protecting corporations in which the stock was jointly owned by the government and private persons.

The *Rainwater* case might be similar to the instant case if Rainwater had been charged with the offense covered by the amendment—making false claims to a corporation the stock of which was only partially owned by the United States Government. That was the conduct Congress meant to expand the statute to prohibit. The expansion indicated no Congressional understanding that the statute as it previously existed did not apply to wholly-owned government instrumentalities. In the instant case, however, the legislative history shows that Congress understood the previous statute not to proscribe loans. Therefore Congress deemed it necessary to amend the statute to proscribe such acts.

Fogarty v. *United States*, 340 U. S. 8, also involved a civil action but no amendment of any statute was involved. *United States* v. *United Mine Workers*, 330 U. S. 258, was also a civil suit which did not involve an amendment. The post-adoptive Congressional views on prior legislation were expressed in debate on a wholly new statute not in *pari materia* with the old. *Commissioner* v. *Acker*, 361 U. S. 87, was a suit to collect a penalty tax. No amendment was involved and the rule of strict construction of penal statutes was applied to protect the taxpayer.

Thus, both the legislative history of the amendment to Section 302 and the effect given to such an amendment

by this Court lead to the same conclusion—that Section 302 before its amendment did not proscribe the acts charged in the indictment.

Conclusion.

For the foregoing reasons, the order of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

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No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE DAVE BECK

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OPINION BELOW

The ruling of the District Court has not been reported, but is set forth at pages 42-47 of the transcript of the Record.

QUESTION PRESENTED

Section 302 of the Labor Management Relations Act of 1947 made it unlawful for an employer to "pay or deliver" to a representative of any of his employees in an industry affecting interstate commerce, or for such representative to "receive or accept" from the employer, "any money or other thing

of value." The question is whether this section is violated by a bona fide loan of money where the recipient, in consideration for the loan, executes a promissory note, repays the principal, and pays interest for the use of the money.

STATUTES INVOLVED

The Indictment was based upon Section 302 of the Labor-Management Relations Act of 1947 (61 Stat. 157; 29 U. S. C. 186). The pertinent provisions of the Act provided:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> * * * * *
>
> (d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

After the transaction involved in this case had been disclosed to the Congress, and after repayment of the loan by Appellee Beck,[1] the foregoing Section

[1] Hearings Before The Select Committee On Improper Activites In The Labor Or Management Field, Part 7, Pages 2197-2221.

was amended by the passage of Section 505 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 537). The statute now reads as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce * * *.
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).
>
> * * * * * *

STATEMENT

The Indictment was filed on June 27, 1959. Count One of the Indictment makes no charge against the Appellee Beck. In Count Two of the Indictment it was charged that the Appellee Beck:

> "did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from ROY FRUEHAUF, FRUEHAUF TRAILER CO., BURGE SEYMOUR, ASSOCIATED TRANSPORT, INC. and BROWN EQUIPMENT AND MANUFACTURING CO., employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

On February 18, 1960, the United States amended the Indictment by the filing of a pre-trial memorandum disclosing that the charge in the Indictment was based upon a loan, rather than an unconditional delivery and receipt of money (R. 10-14).

According to the memorandum (R. 10-14), Beck, in 1954, requested a loan of $200,000 from Appellee Fruehauf. Thereafter, the subject was discussed in a meeting attended by an attorney for Beck. The meeting was not attended by Beck. After this meeting, an attorney for Fruehauf attempted to place the loan at various banks, but was unsuccessful. The loan was then made to Beck from Brown Equipment and Manufacturing Co.

The pre-trial memorandum does not assert that Beck had any knowledge of other details of the transaction or, indeed, that Beck had any knowledge that he represented any employees of Brown Manufacturing and Equipment Co. (assuming that he did in fact represent such employees).

Upon disclosure of the facts relied upon in the pre-trial memorandum, the Appellees moved to dismiss the Indictment (R. 15). The District Court interpreted the Indictment, as amended by the pre-trial memorandum, as being a loan transaction; and the Court dismissed both Counts of the Indictment upon the ground that the statute did not prescribe

loans (R. 42). The Court did not pass upon the contention that the pre-trial memorandum constituted a fatal variance and an unauthorized amendment of the charge of the Grand Jury (R. 17, 32, 46).

ARGUMENT

Appellee has read and knows the contents of the Brief filed by the other appellees in this case. The arguments there made apply equally to Count Two of the Indictment. Accordingly, Appellee Beck, with the permission of the other Appellees, hereby adopts and submits these arguments, as well as the oral argument to be made on behalf of the other Appellees herein.

CONCLUSION

It is respectfully submitted that the Judgment of the District Court should be affirmed.

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IN THE

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October Term, 1960

No. 91

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PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1960

No. 91

—o—

UNITED STATES OF AMERICA,

Appellant,

v.

ROY FRUEHAUF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

—o—

PETITION FOR REHEARING

The appellees Roy Freuhauf, Fruehauf Trailer Company, Burge Seymour, Associated Transport, Inc., and Brown Equipment and Manufacturing Co., pray for a rehearing of the decision herein rendered February 20, 1961, upon the following grounds:

1. *This Court was wholly without jurisdiction upon this appeal to determine that a judicial admission contained in the Government's trial memorandum was "impermissible" as a basis for dismissing the indictment.* In the absence of express statutory authority, no appeal may be taken by the United States in any criminal case, and this Court is without jurisdiction to entertain such appeals. *United States* v. *Sanges*, 144 U. S. 310 (1892); *United States* v. *Dickenson*, 213 U. S. 92 (1909); *United States* v. *Burroughs*, 289 U. S. 159 (1933). For this reason, and because "appeals by the Government in criminal cases are something unusual, exceptional, not favored", this Court has consistently resisted "the opening of an appellate route for the Govern-

ment until it was plainly provided by the Congress", and, then, it has with equal consistency enforced "a close restriction of its uses to those authorized by the statute." *Carroll* v. *United States*, 354 U. S. 394, 400 (1957).

Here, the dismissal of the indictment was appealable, and this Court had jurisdiction over the appeal solely by virtue of the Criminal Appeals Act, Tit. 28 U. S. C. § 3731, which authorizes an appeal in such cases to assure uniformity in the construction of statutes. *United States* v. *Mersky*, 361 U. S. 431, 434-436 (1960). To that end, the Act vests this Court with a narrow jurisdiction only, "confined to ascertaining whether the court in a case under review erroneously construed the statute." *United States* v. *Carter*, 231 U. S. 492, 493 (1913); *United States* v. *Keitel*, 211 U. S. 370, 397, 398 (1908). Upon an appeal such as this, "this Court is not at liberty to go beyond the question of the correctness of, * * * [the District Court's] construction" of the statute, for "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193 (1939); *United States* v. *Petrillo*, 332 U. S. 1, 5 (1947); *United States* v. *Patten*, 226 U. S. 525, 535, 540 (1913).

On this appeal, however, the Court expressly declined to exercise its only jurisdiction under the Criminal Appeals Act—to review the contested construction of the statute—assigning as a reason that the question posed was so "unclear", and had become so "abstracted", as to make the appeal nothing "other than a request for an advisory opinion", which the Court has "consistently refused to give." The Court, nevertheless, set aside the ruling of the District Court dismissing the indictment, and remanded the case for trial, because

> "the District Court's ruling, insofar as it purports to close any avenues open to the Government under the indictment—not in view of specifications made in a bill of particulars or an opening statement, but on the basis of a 'judicial admission' culled from a

pretrial memorandum—was impermissible and constitutes an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal."

But, as *Keitel*, *Carter*, *Borden*, *Petrillo* and *Patten* make plain, the alpha and omega of this Court's jurisdiction under the Criminal Appeals Act was the single question whether the District Court correctly construed the statute on which the indictment was founded. Thus, whether representations made by the Government in its trial memoranda have the same quality to bind as those made in its bills of particulars and opening statements, and what constitutes a "judicial admission" on which a dismissal of an indictment may be based, were questions dehors the narrow limits of this Court's closely defined jurisdiction under the Criminal Appeals Act. These are questions which the Congress has not confided to this Court to determine upon a direct appeal by the Government in a criminal case, and this Court should not have undertaken to decide them. Certainly, this Court should not have set aside the ruling of the District Court and remanded the case for trial on these grounds, wholly beyond its jurisdiction.

2. *This Court was wholly without jurisdiction upon this appeal to construe the statement of facts contained in the Government's trial memorandum.* This Court undertook to construe the statement of facts in the Government's trial memorandum, saying "what the portions of the trial memorandum" relied on by the District Court appeared to it to "establish, at most." It rested its decision on the ground that such statement, as construed by it, "seemingly" permitted the Government "to make out violations of § 302 on any number of alternative theories," five of which it particularized, and that it was "uncertain" to which of these the District Court's ruling was directed. But, where the District Court has dismissed an indictment on the ground that the acts therein charged to the defendant are not crimes under its construction of the statute on

which the indictment was founded, this Court has consistently held that is was withou jurisdiction under the Criminal Appeals Act to "construe" the indictment, and that it "must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review." *United States* v. *Borden Co., supra,* 308 U. S. at 193; *United States* v. *Patten, supra,* 226 U. S. at 535, 540; *United States* v. *Carter, supra,* 231 U. S. at 493; *United States* v. *Keitel, supra,* 211 U. S. at 397, 398; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301, 302, 306 (1919); *United States* v. *Miller,* 223 U. S. 599, 602 (1912).

This follows, as *Keitel* makes clear, from the restricted jurisdiction of this Court under the Criminal Appeals Act, "only to review the particular question decided by the court below for which the statute provides * * * leaving all other questions to be controlled by the general mode of procedure governing the same." 211 U. S. at 397, 398. For the same reason, this Court's jurisdiction under the Criminal Appeals Act does not extend to construing bills of particulars, opening statements or trial memoranda relied upon by the District Court in dismissing an indictment. The full extent of this Court's jurisdiction on this appeal was "to ascertain, as accurately as may be, what interpretation the trial court placed upon" the trial memorandum, "not to interpret it * * *; and then to determine whether, so construed," the acts which the Government thereby represented it would show at the trial, constituted violations of the statute as construed by this Court. *United States* v. *Colgate, supra,* 250 U. S. at 306.

This Court was without jurisdiction on this appeal to construe the trial memorandum, and it should not have undertaken to do so. Nor should this Court have set aside the ruling of the District Court and remanded the case for trial, on the ground that it was "uncertain" which of "any number" of the alternative constructions of the trial memorandum which this Court perceived extrajurisdictionally, was the District Court's construction.

3. *Having declined to exercise its jurisdiction to review, this Court's alternatives were to dismiss the appeal, or to remand the case to the District Court for further proceedings with a view to eliminating the impediment to this Court's exercise of its jurisdiction.* The Court's decision presents a paradox: Although expressly declining to exercise its jurisdiction under the Criminal Appeals Act, alone invoked by this appeal, to review the construction of the statute underlying the ruling of the District Court, this Court has nevertheless set aside such ruling, and has remanded the case for trial. It creates an anomaly, too, in that a ruling of the District Court, which neither this Court nor any other appellate court has held to be erroneous on a ground within its jurisdiction to consider, has been set aside, and the case remanded for trial, just as though the ruling had not been made, or had been found to be error upon review. This consequence flows, it would appear, because this Court found the action below "an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal."

But, in this circumstance, the appropriate disposition of the appeal is either to dismiss it, as the cases cited by the Court itself clearly show, *Parker* v. *Los Angeles County*, 338 U. S. 327 (1949); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450 (1945); see also, *United States* v. *Carter*, 231 U. S. 492 (1913), or, if further proceedings below can eliminate the impediment to the exercise of this Court's jurisdiction, to remand the case for such further proceedings. *United States* v. *Malphurs*, 316 U. S. 1 (1942); *Barr* v. *Matteo*, 355 U. S. 171 (1957); *Jennings* v. *Illinois*, 342 U. S. 104 (1951); *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); Cf. *Dixon* v. *Duffy*, 342 U. S. 33 (1951); *Loftus* v. *Illinois*, 334 U. S. 804 (1948). Certainly, the frustration of the Government's appeal to this Court, and the lack of appellate jurisdiction in any other court, should not serve to deprive the appellees of the benefit of the District Court's

ruling, and if further proceedings below pursuant to this Court's direction cannot result in the review contemplated by the Criminal Appeals Act, the case should be left "as though" the Government "had taken no appeal." *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677, 678 (1944); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631 (1949). For, this Court has consistently taken meticulous care to preserve or restore the *status quo ante*, when in other circumstances its appellate jurisdiction has been unsuccessfully invoked. See, e.g., *United States* v. *Belt*, 319 U. S. 521 (1943); *Phillips* v. *United States*, 312 U. S. 246 (1941); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 (1934); *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1934).

This Court should not have set aside the ruling of the District Court and remanded the case for trial, and thus upset the *status quo*, while at the same time declining to exercise its only authority under the Criminal Appeals Act —to review the construction of the statute on which the District Court's ruling was based.

4. *Having declined to exercise its jurisdiction to review, this Court derived no power from Tit. 28 U. S. C. § 2106 to set aside the ruling of the District Court and to remand the case for trial.* Tit. 28 U. S. C. § 2106 is not a grant of independent jurisdiction, but of powers incidental to this Court's appellate jurisdiction derived *aliunde*. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 241, fn. 17 (1957). Accordingly, this Court may exercise such powers in any given case only in consonance with its jurisdiction, and it may not invoke them on grounds, or for purposes alien to its jurisdiction. *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547 (1932). Here the jurisdiction of the Court was confined to determining the correctness or otherwise of the District Court's construction of the statute on which the indictment was based, but the Court expressly declined to consider that question. Yet, citing

§ 2106, it set aside the District Court's ruling and ordered that the case proceed to trial just as though the District Court had not dismissed the indictment, or this Court had determined that the District Court's construction of the statute was erroneous.

§ 2106 cannot be read as authorizing any such procedure, unless this Court is prepared to say that on appeals under the Criminal Appeals Act, and similar statutes vesting this Court with a limited jurisdiction to consider particular questions only, § 2106 grants this Court full powers to review questions not within its competence to consider under such statutes. So to hold, however, must necessarily involve the discard of the limitations on this Court's jurisdiction carefully defined in *Carter, Keitel, Borden, Miller, Petrillo, Colgate* and *Patten*, and the adoption of a new principle, contrary to the old, that the Government's appeal *does* open the whole case for review. If the Court meant to effect so radical a change, it would seem unlikely that it would have done so elliptically, and without discussion.

Having declined to pass upon the single question open to it to consider under the Criminal Appeals Act, Tit. 28 U. S. C. § 2106 did not authorize this Court to set aside the ruling below and to remand the case for trial.

5. *None of the questions considered by the Court had been raised, briefed or argued by the parties.* In its opinion, the Court said, in its discussion of advisory opinions, that it has "consistently refused" to speak

> "upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *."

Yet upon this appeal, this Court undertook to determine (1) that a judicial admission in the Government's trial memorandum was an "impermissible" basis for the dismissal of an indictment, (2) that the statement of facts in the Government's trial memorandum was susceptible of "any number" of constructions, including the five it described with particularity, (3) that the ruling of the District Court was appropriately to be set aside and the case remanded for trial notwithstanding this Court's refusal to exercise its statutory jurisdiction to review, and (4) that Tit. 28 U. S. C. § 2106 empowered the Court to set aside the ruling below and to remand the case for trial in the absence of a determination that the District Court's construction of the statute was erroneous—although none of these matters had been raised, briefed, argued, or as much as mentioned by the parties. For, as this Court correctly noted, the sole question presented by the Government's jurisdictional statement was "whether a loan of money comes within the * * * prohibitions" of § 302 of the Labor Management Relations Act, 1947 and

> "Briefs and oral argument in this Court proceeded upon the assumption that this question, and only this question, was properly raised * * *."

Moreover, if, as this Court said, Rule 15 did not require it "to penalize the Government by dismissing this appeal *simpliciter*," it can with equal force and fairness be said that the frustration of the Government's appeal neither required nor permitted this Court to penalize the appellees by setting aside the action of the District Court *simpliciter*, and remanding the case for trial.

6. *It is urged that the Court should, in any event, make it clear that in formulating the five "alternative theories" under which "the Government may have attempted to make out violations of Section 302," the Court did not express any opinion as to their applicability.*

In the course of its illustrative demonstration, the Court explicitly and painstakingly formulated five "alternative theories" under which the Government might have proceeded, and therefore may proceed. It qualified this by referring only to "questions of variance between indictment and proof," but not to any questions of substantive proof or statutory construction.

We are certain that this Court did not intend to indicate its opinion as to the validity of any of these alternative theories. However, we cannot be as certain that a District Judge, stimulated perhaps by the Government, will not, albeit unwarrantedly, entertain some doubt as to the Court's intention. The danger, in a subsequent trial or other proceeding, of any intimation of its views by any appellate court which refuses jurisdiction, was cogently pointed out in *Zalkind* v. *Scheinman*, 139 F. 2d 895, 904 (2d Cir., 1943), cert. den. 322 U. S. 738.

In view of the unique authority of this Court, the possibility that its language will influence the District Judge to whom the case is remanded or indicate, however obliquely, that this Court believes that the facts enumerated fall within the proscription of the statute, is so prejudicial to the appellees as in all fairness to require the Court's disclaimer of any such opinion. The unfairness of any such interpretation of the Court's language is all the greater because the appellees were never notified that any of these issues (except the fifth alternative) would even be considered and, in reliance upon the Government's repeated limitation of the question involved, they did not brief or argue them.

It is therefore strongly urged that this Court, in order to avoid any such possibility of unintended prejudice, clarify—if it does not recall—its opinion, by explaining that it is not expressing any view as to the application of the statute to, or the liability of the appellees under, any of the facts or hypotheses enumerated.

Conclusion

For all of the reasons hereinabove set forth, the opinion herein should be recalled, and this petition for rehearing should be granted. The appeal should be dismissed or, if further proceedings below can eliminate the impediment to this Court's jurisdiction, the case should be remanded for such further proceedings. In any event, it is urged that the opinion should be clarified to explain that the Court has not expressed any view as to the application of the statute under any of the hypotheses described by it.

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The undersigned counsel for the appellees making this petition hereby certify that it is presented in good faith and not for delay.

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SUPREME COURT OF THE UNITED STATES

No. 91.—October Term, 1960.

United States, Appellant, v. Roy Fruehauf, et al. | On Appeal From the United States District Court for the Southern District of New York.

[February 20, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

On June 17, 1959, an indictment in two counts was filed in the United States District Court for the Southern District of New York against appellees Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., and Brown Equipment and Manufacturing Co. (hereinafter referred to collectively as the Fruehauf-Seymour group) [1] and appellee Dave Beck. The first count, based on § 302 (a) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U. S. C. § 186 (a), which makes it unlawful "for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce," [2]

[1] It appears that Roy Fruehauf is President of Fruehauf Trailer Co., that Burge Seymour is President of Associated Transport, Inc., and that Brown Equipment and Manufacturing Co. is a wholly owned subsidiary of Associated Transport, Inc.

[2] Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, enacted September 14, 1959, amended this section to read, in pertinent part:

"It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce. . . ."

charged that on or about June 21, 1954, each of the appellees of the Fruehauf-Seymour group, employers of employees engaged in an industry affecting commerce,

> "did unlawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to Dave Beck, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

The second count, based on § 302 (b), 61 Stat. 157, 29 U. S. C. § 186 (b), and similarly couched in the words of the statute,[3] charged that Beck had received and accepted, and agreed to receive and accept, from the appellees of the Fruehauf-Seymour group, $200,000. All of the appellees entered pleas of not guilty; after various pretrial proceedings, during the course of which "trial memoranda" were submitted by the Government and by several of the appellees, the case came on for trial. At the outset of the hearing, the district judge suggested that if, as he was advised by the trial memoranda of certain among the appellees, any of them intended to move for dismissal of the indictment, such a motion should be made at that time. Counsel for the appellees replied that they "would

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[3] Count Two of the indictment charged that "On or about the 21st day of June, 1954, . . . Dave Beck, . . . a representative of employees who were engaged in an industry affecting commerce . . . did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from [the several appellees of the Fruehauf-Seymour group], employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000." Section 302 (b), as it was in effect at the time of the transaction alleged, provided: "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." The Labor-Management Reporting and Disclosure Act of 1959, § 505, amended the section to cause it to parallel the amended version of § 302 (a), note 2, *supra*.

be in a better position to address ourselves to the grounds for a dismissal after the government had made an opening here. . . . if on inquiry in this pretrial, preliminary conference, the government conceded certain positions that it has conceded at arraignment and other places in the minutes." The district judge then read into the record an extended excerpt from the Government's trial memorandum[4] which purported to outline the "facts which support the charge and which the government intends to prove." These were: (A) that Beck asked Roy Fruehauf to "lend him $200,000," which "loan" was subsequently discussed at a meeting of Fruehauf and attorneys for Beck and Fruehauf Trailer Co.; that after unsuccessful attempts to "place the loan" with officers of various banks, "Fruehauf and Burge Seymour found it necessary to arrange the loan without the aid of financial institutions and, instead, processed it through the Fruehauf Trailer Co. (Roy Fruehauf, president), Associated Transport Co. (Burge Seymour, president), and the latter's wholly owned subsidiary Brown Equipment and Manufacturing Co." (B) that "The method by which this otherwise simple transfer of $200,000.00 from Fruehauf to Beck was effected is a fairly complex one, apparently caused by difficulties encountered by the defendant employers in effectuating what they have called a 'loan' but without officers of their corporations learning of the transaction." (C) that "[T]he details of this circuitous financing operations [*sic*]" were as follows: Inasmuch as "Neither Fruehauf nor Seymour wished to effect the loan

[4] The memorandum has not been made a part of the record in this Court. As read into the record, in part, by the district judge, it appears to have been prefixed by the statement:

"This memorandum is submitted for the purpose of supplying the Court with a general outline and analysis of the facts the government intends to prove together with an exposition of the statutory and decisional [*sic*] law regarding the crime charged in the instant case."

by use of personal funds," and "neither Fruehauf nor Seymour felt that their respective corporations could overtly finance the transfer of funds in such an amount without embarrassing themselves," it was determined that the Brown Company "would actually make the transfer to Beck." Thereupon, (1) on June 21, 1954, Fruehauf Trailer Co. "transferred" $175,000 by check to Brown in exchange for Brown's $175,000 promissory note, payable December 30, 1954, and "purporting to bear interest in the amount of 5% per annum," whereas, in fact, "no interest was ever paid to, or even anticipated by, Fruehauf or his corporation." (2) Brown, on the same date, transferred $200,000 to Beck in return for Beck's promissory note for that amount at 4% per annum, payable December 30, 1954—a Brown check requisition form which falsely listed the object of this transfer, being explained by Seymour as intended to conceal from "the people in Associated . . . that Beck was borrowing Associated funds." (3) Associated, on the same date, transferred $200,000 to Brown. One week later, Brown returned to Associated $175,000, the amount lent Brown by Fruehauf. On December 30, 1954, "after Seymour had renegotiated the loan with Manufacturers Trust Co.," Brown returned the remaining $25,000 to Associated. ("It should be noted that Beck was supposed to, but did not, repay the 'loan' to Brown by December 30, 1954.") (4) On December 27, 1954, Seymour borrowed $200,000 at 4% per annum for 90 days from Manufacturers Trust Co., collaterizing the loan with Beck's note and obligations of Fruehauf, Seymour and others, including an attorney for Fruehauf Trailer Co. (5) Seymour paid $2,066.66 interest to Manufacturers Trust, and by check dated March 30, 1955, returned the $200,000 loan to the bank. (6) "Beck paid the $200,000 loan from Brown by remitting to Seymour $163,215, on or about April 11, 1955, and $36,785, on or about June 30, 1955, which Seymour endorsed to

Brown." (7) "Only $4,000 interest, approximately half of the interest due, was actually paid and that was remitted in the form of a check . . . [from Fruehauf Trailer Co.'s attorney] to Seymour."

Having read this portion of the Government's memorandum for the purpose of making known to the appellees "the government's position, at least on the matter of the loan," the district judge ruled that "in my view that statement by the government is a judicial admission that the transaction was a loan. As a matter of fact, to verify that belief, the government later argues in its brief that the use of the money was a thing of value. So at least, so far as I am concerned, there can be no dispute that the government's position is that this was a loan, and we are now resolved to the question of whether a loan under these circumstances was illegal under the statute. . . ."

"[O]n the basis of the disclosure by the Court of what the Court understands to be a judicial admission by the government," the court then asked again whether appellees wished to be heard on a motion to dismiss. At this point, government counsel interposed "to communicate one thought to the Court that may not have been communicated by my brief." He stated:

> "Despite the fact that there is the repeated use of the word 'loan' in the government's advance outline before the Court, caused by the fact that the government's case in large part is as asserted by these defendants as the trial will reflect as it proceeds, nevertheless the government's position on the loan, and I hope to make this clear as the trial progresses, is actually twofold.
>
> "A loan, if your Honor please, is something that relates to a state of mind between the person who is receiving the money and the person who is giving the money, and again the repayment which actually occurred in this case is only one aspect of whether or

not the transfer of funds between one party or from one party to another is actually a loan.

"Now, to be quite specific, I will simply say that the position that the government takes is that the government has called this a loan, and in reiterating the facts as we know them from the defendants, the defendants having repeatedly used the word 'loan,' we say that this is not necessarily so, because in fact any loan when it is made, to prove the fact that it was a loan, goes through certain stages, and is accompanied by certain attributes and here those items were not present in this case."

After adverting to the size of the "loan," the fact that no collateral was given, and the facts that the "loan" could not be processed through financial institutions, that no interest was paid between the corporations although the transaction purported to require its payment, and that Beck did not in fact pay the 4% interest due under the terms of his note to Brown, government counsel concluded: "That is our first position. And the second position is that even if this is a loan as a matter of law it is still encompassed within the statute." The district judge replied:

"I do not think that anything you said detracts from the argument that you made in your memorandum, that you are going to prove that this was a loan, and on that basis I intend to entertain an application with respect to the dismissal of the indictment."

All of the appellees moved to dismiss on the ground, among others, that the transaction between Beck and the Fruehauf-Seymour group, being a "loan," was not within the prohibition of the statute. Argument on the motion was had, and government counsel reiterated his position:

"The COURT: Assuming that this case was tried and the Court was disposed to frame special interroga-

tories to the jury, and one of those interrogatories was, Was the transaction a loan, and the jury brought back the answer No: do you think the Court could allow that answer to stand on the basis of the facts as you have set them forth in your brief, or wouldn't the Court have to set aside the finding as being contrary to the evidence and the weight of the evidence?

"Mr. GUZZETTA: Your Honor, in the context of the remarks I made after you read in open court my brief, I would say that that would not be an erroneous finding by them.

"The COURT: In other words, your position is that despite the facts which you set forth this could be held to be not a loan? When I say the facts you set forth, I mean the facts in your memorandum.

"Mr. GUZZETTA: As I tried to indicate, . . . the government's position is twofold. If it wasn't a loan, if the jury determine on the basis of the facts which they hear that this was—that the outer clothing, fabricated by one highly complex intercorporate transaction, didn't make this transfer a loan, clearly, it would come within the statute. There would be no problem in my mind at all. Secondly, if the jury decided that it was a loan, I wouldn't say that that would preclude them from finding a verdict of guilty because, . . . a loan is encompassed under the statute."

The District Court granted the motions to dismiss the indictment as to all of the appellees. It ruled:

"I am convinced that the language which I read into the record from the Government's brief is a judicial admission that this transaction was a loan. I have no doubt in my own mind at least, that in a trial either to the court or the jury, in a preliminary hearing where the defendants have not yet subjected themselves to jeopardy, if the Government estab-

lished the facts which it recounted in its brief that it intended to prove, a finding by a jury to the contrary would have to be set aside, nor could the Court find to the contrary. Those facts, in my view, notwithstanding the qualifications attempted orally, and despite those qualifications and accepting those qualifications, those facts, in my view, establish that the transaction was a pure and simple loan.

". . . Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not."

From this oral ruling the Government brought the case here by direct appeal pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731. The sole question presented in its Jurisdictional Statement is "whether a loan of money comes within the . . . prohibitions" of § 302 of the Labor Management Relations Act, 1947.[5] Briefs and oral argument in this Court proceeded upon the assumption that this question, and only this question, was properly raised by the record, and that the question, thus shaped, presupposed the substantial reality and *bona fides* of the "loan." Counsel for the Government, in response to questions from the bench, asserted that in light of the framing of the issues on this direct appeal, the Government's trial theory would have to be that the Beck-Fruehauf-Seymour transaction was an incontestable, good-

[5] This statement of the question differs from that in the Government's Notice of Appeal, which stated the issue to be "Whether the payment of money by an employer (of employees in an industry affecting commerce) to a representative of his employees, intending repayment of said money with interest, is within the proscriptions of Section 302 (a) and (b) of the Labor Management Relations Act, 1947. . . ."

faith loan at a fair rate of interest, and that such other circumstances of the transaction as the lack of collateral would be immaterial. However, in a subsequent communication addressed to the Court and opposing counsel by the Solicitor General, the Government took the position "that the Court may properly take account in disposing of this case of the salient facts with respect to the transaction, as developed by the prosecutor before the district judge and as taken into account by the district judge in dismissing the indictment, and that the question before the Court may be considered in the factual context in which it was presented; the question presented fairly comprised the two issues of (1) whether any loan was covered by Section 302, and (2) whether this loan was covered by Section 302."

On this record, the question put to the Court for our direct review under 18 U. S. C. § 3731 is left unclear. An indictment cast in statutory language has been dismissed for failure to charge an offense within the meaning of the legislation whose words it employs, on the ground (as expressed in the ruling of the District Court) that the Government's trial memorandum constituted a "judicial admission that the transaction was a loan." The portions of the trial memorandum upon which this ruling rests establish, at most, that approximately a year after the Fruehauf-Seymour group transferred $200,000 to Beck, Beck transferred $200,000 back to the Fruehauf-Seymour group, with $4,000 "interest," "approximately half of the interest due." On the basis of such facts, putting aside of course all questions of variance between indictment and proof that might emerge at a trial, seemingly the Government might have attempted to make out violations of § 302 on any of a number of alternative theories: (1) that the "loan" was a sham, a mere ruse and covering device intended to pass from Fruehauf and Seymour to Beck a gift or bribe of money; (2) that irre-

spective of intention, the acceptance by the Fruehauf-Seymour group of $200,000 plus $4,000 interest in satisfaction of Beck's obligation to repay the "loan" with twice that amount of interest constituted a forbidden delivery of the unpaid interest to Beck; (3) that irrespective of the terms of Beck's note, the loan of a large sum of money at a rate of interest significantly lower than the going commercial rate effected a delivery to Beck of the difference between the interest payable at a commercial rate and the interest agreed on; (4) that irrespective of the interest rate the transaction—by which Fruehauf and Seymour made available a large, unsecured loan which Beck could not have gotten through normal financing channels—resulted in the delivery to Beck of a "thing of value," namely, the benefit of having the money in hand; (5) that irrespective of the particular incidents of this transaction, all loans, as such, violate the statute, either because the use of money is itself a "thing of value" which may not in any case be delivered by an employer to his employees' representative, even in consideration of the payment of interest, under the statute, or because every loan, *qua* loan, comports the "delivery" of the thing loaned, which delivery (regardless of repayment) violates § 302.[6] However, the District Court's ruling that, by admission of the Government, the transaction was a "loan," appears to mean that, in light of its trial memorandum, the Government is foreclosed from pursuing some, probably most, of these theories. Which among them the court thus viewed as closed remains uncertain. On the other hand, in a representation to this Court, the Solicitor General does not leave it unequivocally clear, so

[6] Subsection (c) of § 302 excepts five enumerated situations from the section's broad ban on delivery or receipt of any thing of value. *E. g.*, § 302 (c)(3) provides that the section shall not be applicable "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business."

as to preclude controversy in the lower court were the case to be allowed to go to trial, which (if not all) of the theories he would regard as still open. The only issue which we can be sure that the District Court decided as a matter of construction of the statute (as distinguished from those issues which the District Court held could not be proved under the indictment consistently with the Government's "judicial admission") is the issue posed by the fifth theory above—the issue posed, in its most evidently abstract form, by the question presented here in the Government's Jurisdictional Statement—"whether a loan of money," every loan of money, as such, "comes within the [statute's] . . . prohibitions."

We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the immediate considerations which should determine the disposition of appellees' motions to dismiss an indictment incontestably valid on its face—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give. See *Parker* v. *Los Angeles County*, 338 U. S. 327; *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Arizona* v. *California*, 283 U. S. 423.

Nor does the record raise questions concerning the sufficiency of the indictment which would require, in an appropriate case, that the case be sent to the Court of Appeals, pursuant to 18 U. S. C. § 3731. For this is not

a case in which the District Court has construed the allegations of an indictment, or limited the scope of the Government's presentation by construction of a bill of particulars or the prosecutor's opening statement. In the present case we cannot know with reference to what supposed factual circumstances the District Court attributed to the Government the admission that the Beck-Fruehauf-Seymour transaction constituted a "loan." Without spelling out in detail the diverse argumentative possibilities that underlie the judge's attribution of a "loan" as an unequivocally defined concept to the Government, it suffices to say that experience in instances of similar unclarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court. Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, with *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85.

The core of the difficulty in the present case is that the record does not preclude the Government from attempting to prove that the transaction in question came within the statutory ban by reason of any or all possible theories. Of course, an undertaking by counsel here, however honorable its impulse, cannot bind the Government in the future. And the District Court's ruling, insofar as it purports to close any avenues open to the Government under the indictment—not in view of specifications made in a bill of particulars or an opening statement, but on the basis of a "judicial admission" culled from a pretrial memorandum—was impermissible and constitutes an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal.

We do not think, however, that the purpose of Rule 15 of this Court, under which the Government filed the Jurisdictional Statement which brought the case here, requires us to penalize the Government by dismissing this

appeal, *simpliciter*. This Court has the power, expressly provided in 28 U. S. C. § 2106, to "vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and . . . remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." The exercise of that authority is appropriate here. The ruling dismissing the indictment is set aside and the case is remanded for trial upon this valid indictment.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 91.—October Term, 1960.

United States, Appellant, v. Roy Fruehauf, et al. | On Appeal From the United States District Court for the Southern District of New York.

[February 20, 1961.]

Mr. Justice Stewart, dissenting.

The dismissal of the indictment in this case was placed squarely upon the district court's construction of a criminal statute. Specifically, the court ruled that a loan of money did not fall within the prohibition of § 302 of the Labor Management Relations Act of 1947 (before its amendment in 1959). In bringing the appeal directly here, the Government eliminated from the case any possible questions other than the correctness of the district court's construction of the underlying statute—to which this Court's jurisdiction is limited under the Criminal Appeals Act. 18 U. S. C. § 3731. *United States* v. *Keitel*, 211 U. S. 370, 397–398; *United States* v. *Patten*, 226 U. S. 525, 535, 540; *United States* v. *Colgate & Co.*, 250 U. S. 300, 301, 306; *United States* v. *Borden Co.*, 308 U. S. 188, 192–194. "[I]n reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For 'The Government's appeal does not open the whole case.'" *United States* v. *Petrillo*, 332 U. S. 1, 5.

I think the issue whether a loan of money came within the proscriptions of the statute is before us now and should be decided. I further think this is the only issue properly before us. However, since the Court thinks otherwise, I am persuaded that an expression of my views on the subject would not be appropriate.